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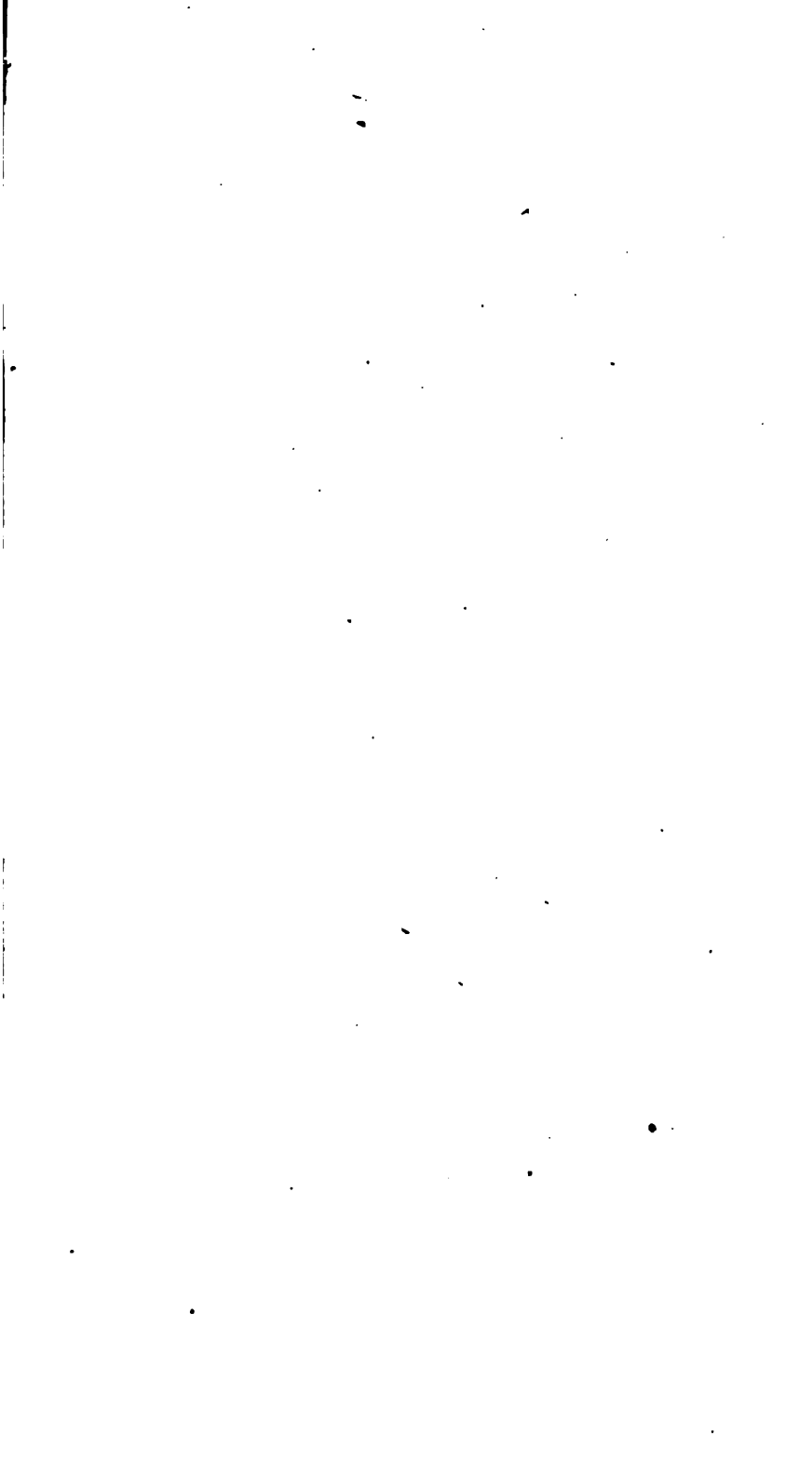
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REPORTS

OF

CASES

ARGUED AND DETERMINED IN

THE COURT OF KING'S BENCH,

TOGETHER WITH SOME OTHER CASES,

IN MICHAELMAS, HILARY, EASTER, AND TRINITY TERMS,

BEING THE WHOLE OF THE FORTY-FIFTH YEAR OF THE REIGN
OF GEORGE III. (1804 AND 1805.)

WITH

TABLES OF THE NAMES OF THE CASES AND OF THE
PRINCIPAL MATTERS,

BY JOHN PRINCE SMITH, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.

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ADVERTISEMENT.

ON the publication of a second annual volume, the **REPORTER** cannot let slip the opportunity of returning thanks for the very kind assistance which he has received, as well from the officers of the court, as from the gentlemen who have been concerned in the cases reported.

With respect to his mode of reporting, it is not necessary to repeat the design which he has had in view. He should, for his own part, consider that report as the best which details the case and the arguments in the most concise manner, and which conveys a clear and accurate, yet brief exposition of the judgment. He has, probably, not quite succeeded in attaining this end, and has, too many times, erred on what may be called the safer side; yet, he hopes, that there will be found, in the present publication, suffi-

cient evidence of general accuracy, as well as some signs of actual and potential improvement.

Many cases of *practice* will be found in this volume which are not extant in other works, and to such cases the REPORTER will always give a particular attention; for *practice* is the mere creature of the *court*, and can only be settled by frequent decisions, which, unless they are publicly recorded, are lost to the profession.

21st Nov. 1805.

JUDGES

DURING THE TIME OF THESE REPORTS.

HIGH COURT OF CHANCERY.

JOHN LORD ELDON, CHANCELLOR.

SIR WM. GRANT, KNT. MASTER OF THE ROLLS.

COURT OF KING'S BENCH.

EDWARD LORD ELLENBOROUGH, C. J.

SIR NASH GROSE, KNT.

SIR SOULDEN LAWRENCE, KNT.

SIR SIMON LE BLANC, KNT.

COURT OF COMMON PLEAS.

SIR JAMES MANSFIELD, KNT. C. J.

JOHN HEATH, ESQ.

SIR GILES ROOKE, KNT.

SIR ALAN CHAMBRE, KNT.

COURT OF EXCHEQUER.

SIR ARCHIBALD MACDONALD, KNT.

SIR BEAUMONT HOTHAM, KNT. *resigned in Hilary Term.*

SIR ALEXANDER THOMPSON, KNT.

SIR ROBERT GRAHAM, KNT.

SIR THOMAS MANNERS SUTTON, KNT. *appointed in Hilary Term.*

ATTORNEY GENERAL.

THE HONOURABLE SPENCER PERCEVAL.

SOLICITOR GENERAL,

SIR THOMAS MANNERS, SUTTON, *promoted to the Exchequer.*

SIR VICARY GIBBS, knighted, and appointed Solicitor General in Hilary Term.



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CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN MICHAELMAS TERM,

In the 45th Year of George III.

DOE on the Demise of PERRING and CADELL against
HEATH.—Nov. 7.

1804.

In ejectment, where the plaintiff claims title, under an assignment for the benefit of creditors, on unstamped paper, under the Lords' Act, 32 Geo. II. c. 28, the plaintiff must prove the rules of court for the bringing up of the prisoner, and for his discharge, or, at least, the former rule. For, unless there is a rule to bring up the prisoner, the court has no power to order his discharge, and the assignment is not valid, under the above act, without a stamp.

THIS was an ejectment for four messuages, &c. at Lewisham, in Kent, tried at Maidstone last summer assizes, before Mr. Serj. RUNNINGTON. The lessors of the plaintiffs, who were the sheriff of *Middlesex*, claimed under an assignment to them, for the benefit of the creditors of the *defendant*, who had been a prisoner in execution, in the custody of the said sheriff, for debt on a bail-bond. The *plaintiff's* counsel offered to prove, at the trial, that the prisoner, *Heath*, had petitioned to be brought up under the *Lords' Act*, 32 Geo. II. c. 28, to

DOE dem.
PERRING and
CADELL
versus
HEATH.

1864.

Doe dem.
PERRING and
CADELL
versus
HEATH.

be discharged out of custody; and his petition was produced. He offered also to prove, his amendment of the schedule in court; to prove the execution of the assignment by the attesting witness; and to shew the *defendant* to have been liberated in consequence thereof. He proved also, that the *defendant* came up in pursuance of a paper, served at the office, though not examined. This was the rule for bringing him up only, not for his discharge. The *defendant's* counsel objected to the reading of the assignment, because it was upon unstamped paper. The above evidence was offered to shew that the prisoner was discharged under the *Lords' Act*; and, by the 17th section, it is provided that no stamp shall be necessary on any *such* assignment. The learned Judge, however, nonsuited the *plaintiff*, upon the ground, that the rule of court or Judge's order for the *defendant's* discharge not being produced, the assignment was not admissible, for want of a stamp. For, without an order of the court, it did not appear that it was an assignment under the *Lords' Act*. The point was accordingly saved, and

MARRYATT, for the *plaintiff*, now moved to set aside the nonsuit, urging that the order for the discharge of the prisoner was considered in the act as a matter subsequent to the assignment, and therefore could not be requisite to give validity to it.

But, by the COURT. "There was no proof given of any act done by the court. You should have produced both the orders of the court. Perhaps, if you had produced the rule of court for the prisoner's being brought up to obtain his discharge, the proof of his being at large afterwards, might have been sufficient evidence from which to have presumed a regular order or rule of court for the prisoner's discharge; but, admitting that to be proved, and the assignment also, yet there would be no proof of a lawful act of the court to warrant the prisoner's discharge, under the terms of the act of parlia-

ment; and the assignment itself is good for nothing, unless it is made strictly, according to the terms of the act."

RULE NISI REFUSED.

1804.

DOE DEM.
PERRING and
CADELL
VERSUS
HEATH.

ROBINSON against MAY.—Nov. 8.

Though it may be the duty of all persons to give information to his majesty's proper officers concerning abuses, yet if one write of another in a letter to such officer, that he is doing something to the prejudice of his majesty's service, which is not true, this is sufficient evidence of a malicious intention; and where no excuse is set up by the defendant, the jury may well find him guilty, though there be no other publication and no further proof of malice. What is a malicious publication, it is for the jury to determine.

IN case for publishing a libel, tried at the last assizes for Suffolk, before HEATH, J. the libel proved was an anonymous letter, written by the defendant to Sir Evan Nepean, for the Lords Commissioners of the Admiralty, in which he stated that the plaintiff had taken upon himself to grant protections to certain mates of vessels, that he was in fact not a magistrate for the seaport town, and had no power to do so, but that this was to the prejudice of his majesty's service. In this letter the defendant stated the names of certain mates, and of their ships, for which he said such protections had been granted. The protection alluded to is granted usually to the mates of ships in the Greenland fishery, and other trading vessels, by a magistrate, upon oath made by the captain that the bearer is his mate. The Admiralty Board immediately sent to the regulating-officer at Yarmouth to make inquiry into the fact; and he applying to the defendant himself and to others, and finding that there was no truth

ROBINSON
VERSUS
MAY.

1804.
ROBINSON
versus
MAY.

in the charge, Sir E. Nepean gave up the letter, and directed an action to be brought. The *defendant's* counsel, at the trial, called no witnesses; but insisted that the *plaintiff* had not sufficiently proved a malicious publication, since this was only a confidential communication to the proper officer to whom information ought directly to be sent, and there was no other proof of any malicious intention, or of any further publication. The case was left to the jury by the learned judge, and they found a verdict, *guilty*. SELLON, Serj. now moved for a new trial, on the above grounds, and also in arrest of judgment. He cited *Lake v. King*,* and *Rex v. Bailey*,† to shew that a communication, concerning abuses made to proper public officers, is not a malicious publication of a libel. Lord ELLENBOROUGH, C. J. observed, that those were cases in which it was the duty of the *defendants* to make such communications or complaints, but that this might be merely an officious interference. Upon inquiry, it appeared that the *defendant* was a magistrate, and might grant the protections himself; and ERSKINE, *amicus curiæ*, mentioned a case which occurred just before he was called to the bar, in which one being about to be married to the *defendant's* sister, he (the *defendant*) wrote to her, desired her not to marry the *plaintiff*, and stated circumstances to his discredit; and there Lord C. J. De Grey said, that, if the publication was only to the sister, it would not be a libel,

Lord ELLENBOROUGH, C. J. thought, that, being to his sister, it might be considered as his duty to write to her, and, even here, he said, it might be considered as the duty of every person to communicate to his majesty's servants every circumstance of this kind, which might be prejudicial to the interest of his majesty's service. He also doubted whether the Board of Admiralty did right

* 1 Saund, 131.

† 1 Esp. 596.

in suffering the paper to go out of their hands, since it might tend to discourage the giving of information concerning abuses. But as to the question of malicious publication or not, it was entirely with the jury; and the absence of all ground for the representation was, he said, sufficient proof of malice where no excuse was offered in evidence on the part of the *defendant*.

1804.

ROBINSON
VERSUS
MAY.

On the motion in arrest of judgment, the COURT held that it was matter of libel, if properly averred and stated in the declaration, and SELLON took nothing by either motion.

DAY-RULES.—Nov. 8

Where a prisoner applies for day-rules beyond the usual time, and obtains them, and it is necessary to apply for longer time, in the same term, the court will require him to state how he has employed the time before granted.

BARROW having moved for nine day-rules for a prisoner, the court would only grant four days, and said. that he must apply, after that time, for further rules, if necessary; but that he ought to state in his affidavit for obtaining such further rules, how he employed the four days now granted.

DAY-RULES

JONES against VAUGHAN and HALL.—Nov. 8.

In trespass against a constable, where there is a demand of the perusal, or copy of the warrant, under statute 24 Geo. II. c,

1804.

JONES
versus
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et al.

44, which ought to be complied with in six days, yet if the plaintiff does not proceed, it is sufficient if it be complied with before the action brought.

ACTION of trespass against the *defendants*, for breaking and entering the *plaintiff's* dwelling-house, and taking, seizing, and killing two of his dogs. The *defendants* justified, as constables, under the warrant of a magistrate directing them to search for dogs, under the game laws. The *plaintiff* proved a notice to the *defendants* under the statute 24 Geo. II. c. 44, s. 6, demanding "a copy or perusal of the warrant of the justice." Eight days after the service of this notice, the attorney for the *defendant* went to the *plaintiff's* house, and shewed him the warrant, and the action was not commenced till afterwards. At the trial, at the last assizes for Hereford, before LAWRENCE, J. it was insisted, that the justice ought to have been joined in the action, under the provisions of the above act, and, the learned judge being of that opinion, the jury gave a verdict for the *defendants*.

JERVIS, for the *plaintiff*, now moved to set aside the verdict, and that a new trial might be had. "There was," he said, "a period of time, when, most clearly, the action might have been brought against the constables without joining the justice, namely, during the interval between the sixth day after the demand and the time of producing the warrant;" but the question was, here, whether the demand must strictly be complied with during the six days, or the *plaintiff* neglecting to proceed, after waiting for that time, the *defendant* might avail himself of such delay, by afterwards complying with the demand at any time before the suit was actually commenced. The question arises on the following words of this act. "No action shall be brought against any constable, &c. until demand made in writing, of the perusal and copy of such warrant; and the same hath been refused or neglected for the space of six days after such demand; and in case of such demand and compliance, by shewing the said war-

1804.

JONES
versus
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et al.

rant to and permitting a copy thereof to be taken by the party demanding the same,' then the act directs a verdict to pass for the *defendant*, &c. from these words, 'in case of such demand and [such] compliance,' the warrant ought to be produced within the six days, and it is not sufficient to produce it after, though it be produced before the action brought."

Lord ELLENBOROUGH, C. J. "I do not think that the word *such* must necessarily be joined with the word *compliance*, in that sentence, though it must with the word *demand*; no inconvenience can arise to the party from delay, in being driven off beyond the time when the month's notice is to be given to the justice; [such an inconvenience was suggested] because that must arise entirely from your own fault.

It was insisted also at the trial, that shewing the warrant was not sufficient, but that the *defendant* should give a copy. It was contended, *à contra*, that the act did not direct a copy to be given, but only that it should be permitted to be taken.

Lord ELLENBOROUGH, C. J. observed, that, here, the demand itself was for a copy, or perusal of the warrant, and so the question did not arise.

RULE NISI REFUSED.

BONNER against CHARLTON.—Nov. 8.

Where a verdict is taken for a fixed sum, subject to an arbitration, and the arbitrator, through mistake of his power, awards a larger sum to the plaintiff, the court will permit the plaintiff, upon motion, to enter the judgment for the sum in the verdict.

1804.

BONNER

VERSUS

CHARLTON.

the arbitrator stating in an affidavit that he considered on the subject matter of the cause referred.

IN this case, the rule obtained to shew cause, why the verdict should not be entered up for 30l. being the sum mentioned in the verdict, although the arbitrator had awarded 70l. having power only over 30l. was now made absolute; upon an affidavit that they (the arbitrators) had considered only the subject matter referred to them, namely, what damage had been done to a certain farm, and that the sum of 70l. they awarded, because they thought it a fair and reasonable compensation for the injury. , [See the case in *Smith's Rep.* 44 Geo. III. p. 369.]

The KING against the MAYOR of GLAMORGAN.—Nov. 8.

Where, on a mandamus to admit a freeman, the party pleads, and damages and costs are given to the prosecutor, he is entitled to levy in execution for the sheriff's poundage also, under 43 Geo. III. c. 46.

The KING
VERSUS
MAYOR of
GLAMORGAN.

ON a rule against the sheriff of Glamorgan to return a writ of *fi. fa.* and a motion for an attachment, the question was, whether the sheriff ought not to have levied the poundage, under the statute 43 Geo. III. c. 46, as well as the damages and costs recovered, on an issue upon a *mandamus* to admit a freeman to the borough of Glamorgan.

GIBBS, for the prosecutor, contended that this issue upon a *mandamus* was an action within the meaning of that act; for by the statute 9 Anne, c. 2, "as often as any writ of *mandamus* shall be issued, it shall be lawful for any party to plead therein, as if the party had brought his action for a false return;" and the same statute, s. 3,

provides, that, " if any damages be recovered under this act, the party shall not be liable to be sued in any other action or suit.

1804.
The KING
versus
MAYOR of
GLAMORGAN.

The COURT were of opinion that this was an action within the 43 Geo. III. c. 46, since it partook so much of the nature of an action, that the defendant was to pay one shilling damages, and costs, to the party prosecuting; and that, therefore, the sheriff must levy for the poundage.

RAIKES against TOWNSEND and Another.—Nov. 9.

If a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. The cases put in 2 Roll. Ab. 144, b. Nuisance, Reformation, (S.) are only put by way of instance.

TRESPASS, for breaking and entering the plaintiff's close, called the Mill-pond Meadow, in Dunsborne Abbots, Gloucester, and pulling down, demolishing, and destroying a certain dam there erected, for the purpose of supporting, making, and containing a certain fish-pond; whereby the water did run and flow out of the said pond, and the plaintiff lost the water thereof, &c. Pleas, 1st, Not guilty, and several pleas in justification; viz. 1st. That one Giles Haines was seised in fee of three closes, &c. in Daglingworth, in the said county, and that a certain rivulet, or stream of water, from time whereof, &c. until the wrongful obstruction after mentioned, ran and flowed, &c. from the said close of the plaintiff, in

RAIKES
versus
TOWNSEND
and Another,

1804.

RAIKES

versus

TOWNSEND
and Another.

which, &c. through divers lands unto and into, and through the said closes of the said *G. H.* for the use of the tenant and tenants of the said closes, for the watering of his and their cattle from time to time, feeding and depasturing thereon; and that, before the time when, &c. and on, &c. the said dam was wrongfully put, &c. and, at the said times, when, &c. wrongfully remained, and was in the said close of the *plaintiff*, upon and across the channel of the said rivulet, and penning up, confining, and obstructing divers large quantities of the water of the said rivulet, in the said close of the *plaintiff*, in so much that divers large quantities of the waters of the said rivulet were thereby wrongfully prevented from running from and out of the said close of the *plaintiff* unto and into the said closes of the said *G. H.* as before that time they had, &c. and were wrongfully pent up, kept, and confined in the said close of the said *plaintiff*, and were there evaporated, absorbed into the earth, and lost; and whereby the said *G. H.* could not have the use of the said rivulet in his said closes for the watering of the said cattle, at the said times, when, &c. feeding and depasturing therein, in so ample a manner, &c. the said *defendants*, as the servants of the said *G. H.* and by his command, in order to remove the said nuisance, &c. broke and entered the said close, &c. and pulled down, &c. (justifying the whole of the trespass) as it was lawful, &c. 2dly, a like plea, as the servants of one *H. H.*; 3d plea, stating a prescription for the inhabitants of dwelling-houses in *Daglingworth*, to have the liberty of taking the water from the said rivulet in the said parish, to their respective dwelling-houses there, to be therein used for the cooking and dressing of their victuals; then stating the obstructing as before, whereby the *defendants* and the other occupiers, &c. could not have the use of the same in as ample a manner, and so justifying the abatement of the dam, &c. as a nuisance. There were other similar pleas to the number of six in the whole. Replication, joining issue, on not guilty. As to the special pleas, the *defendant*, *de injuria sua propria*, committed the trespasses. Also a

new assignment ; to which the *defendant* pleaded not guilty, &c. At the trial, at the last assizes for *Gloucester*, the nuisance being proved, the jury found a verdict for the *defendants* on the above pleas.

1804.
BATES
versus
TOWNSEND
and Another.

WILLIAMS, Serj. now moved for a rule to shew cause why the verdict should not be set aside, and the judgment entered up for the *plaintiff*, instead of the *defendant*. He moved this upon the ground that the *defendant*, in the pleas upon which he obtained his verdict, had not stated a nuisance to have existed of such a nature, as by law would entitle him to enter upon the *plaintiff's* land to abate it ; but that he should be put to his remedy by action upon the case. He admitted that there were many precedents in practice of such pleas of justification, but they were never judicially before the court ; and, he contended, that they were only available where the nuisance was to the *defendant's house*, his *mill*, or his *land*. He cited *Baten's case*,* where Lord Coke says, *nota*, "There are two ways of redressing a nuisance, one by action, and in that he shall recover damages, and have judgment, that the nuisance shall be removed, abated, or cast down, as the case requires ; or the party grieved may enter, as appears by 17 E. III. 44 ; 9 E. IV. 35." But that case, (*Baten's case*) was a *quod permittat*, to prostrate a messuage erected to the injury of the house of the *plaintiff*. And in 2d Roll's Abridgment, 144, pl. 2 and 3, it is only said, that "If a man in his own soil, erects a thing which is a nuisance to my *mill*, or my *house*, or *land*, &c. I may stand on my own land and abate it ; 9 E. IV. 35, b. So, I may enter on his land and abate the nuisance, and justify the same in trespass. 9 E. IV. 35. *Curia*, E. IV. 5. Co. 9. *Baten*, 55. Co. 5. *Penrudd*." From which the right of abatement should seem to be confined only to the cases there put.

* 9 Rep. 56, b.

1804.
RAIKES
versus
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and Another.

But by Lord ELLENBOROUGH, C. J. "Those cases are only put as instances. You should come with a very strong case to apply to enter up judgment for the one party instead of the other, after a verdict. There are not above three cases reported in which this was ever done. We must leave you to bring your writ of error."

RULE NISI REFUSED.

STOKES against LEWIS.—Nov. 9.

Where an arbitrator awarded a sum, together with costs of the award to be paid, not exceeding a certain sum, between the parties, the party to whom the money was awarded was allowed, upon taking out the award and paying the whole costs, to have an attachment against the defendant for the sum awarded and his share of the costs.

STOKES
versus
LEWIS.

ON a motion for an attachment for non-payment of money on an award, it appeared that the arbitrator had awarded the costs of the award to be paid, not exceeding a certain sum, between the parties. One of the parties took out the award and paid the costs, and then applied for an attachment for the sum awarded, with half the costs, paid by him for the other party.

GARROW, for the *defendant*, said that this award was uncertain, and that a voluntary payment made by one party for the other could not make him, for whom it was paid, liable in assumpsit.

But the court held that this was certain, *quia certum reddi potest*; and WIGLEY having cited a case from 1 Bqs. and Pull. Reports as decisive.

Lord ELLENBOROUGH, C. J. said that the matter was too apparently reasonable in itself to require the authority of cases for it.

1804.
STOKES
versus
LEWIS.

ATTACHMENT GRANTED; to lie in the office a week.

ADAMS' against THOMPSON.—Nov. 9.

Where the defendant moves to stay proceedings on a bail-bond, and the plaintiff has not lost a trial, he is not entitled to impose terms of receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so that the plaintiff may go to trial within the term. He is only entitled to costs. Vide 1 Tidd's Practice, 158. Ed. 1799, and R. M. 8 Anne Reg. 1. (c.) Cowp. 71, there cited, contra. No affidavit of merits is necessary in such case,

NOTE, à relatione, J. ESPINASSE.

WISLEY moved to stay proceedings on a bail-bond, the bail having since justified. The writ was of last term; of course a trial was not lost; I contended that I was entitled to impose the following terms, viz. to accept a declaration, plead issuably, and take short notice of trial. I had relied on 1 *Tidd's Practice*, 158,* ed. 1799. The MASTER said that the *plaintiff* was not entitled to such terms, but to pay the costs only.

ADAMS
versus
THOMPSON.

In the same case, the MASTER said, that no affidavit of merits was required to entitle the *defendant* to stay the proceedings.

* Mr. Tidd cites R. M. 8 Anne, Reg. 1 (C.) Cowp. 71.—
Editor.

1804.

COXETER and Another against BURKE, (Bail).

Nov. 9.

Whether the suit against the principal be by bill or original, the venue in a sci. fa. may be in Middlesex; for a sci. fa. being a local action founded upon a record, the proper venue is, where the record (i. e. the recognizance of bail) is, and that recognizance in the K. B. is a record in Middlesex.

COXETER
and Another
versus
BURKE.

ON shewing cause against a rule, to shew cause why the proceedings on the *sci. fa.* against the bail, should not be set aside for irregularity; the irregularity complained of was, that the former defendant was sued in London, and the bail were accordingly put in London, whereas the venue in the *sci. fa.* was in Middlesex.

LAWES, in support of the rule, contended that, where the suit was by original, the *sci. fa.* ought to follow the former proceedings, of which it was considered as a continuance, though it would be otherwise in an action commenced by bill only; and said that in *Yates v. Plaxton*,* where the venue in a *sci. fa.* was laid in York city, and the original was in the county of York, it was held bad. He also cited *Harris and Another v. Calvert and another*, bail of Cooper.†

LORD ELLENBOROUGH, C. J. "Argue this upon larger principles. Is not this proceeding by *sci. fa.* an action, which you say is to be considered as local; and is not its proper locality to be in the place where the record is upon which this action is founded? In actions for malicious prosecution, the venue is properly laid where the record is. The recognizance of bail is the record in this case; and that recognizance is a record in Middlesex, for the recognizance in the King's Bench is not merely obligatory by the caption. Middlesex, therefore,

* 3 Lev. 235.

† 1 East, 603.

is universally the right county in which to lay the venue in a *sci. fa.* whether the original suit was by bill or by original. It may perhaps be right in another county, but it cannot be wrong in *Middlesex*."

1804.
—
COXSTER
and Another
versus
BUNKA.

THE RULE DISCHARGED WITH COSTS.

HUMPHREYS was for the plaintiff.

HUNT against SILK.—Nov. 9.

Here, on a special agreement, one party is to do an act and to pay money, on a certain day, and the other in the mean time to do another act, in consideration thereof, and the former pays the money before the day and permits the agreement to be in part performed, but the whole is not completed within the time, and the other party fails in a substantive and separate part of his agreement, before the day; he who would rescind the contract must do so immediately upon the expiration of that day, and should not continue to act under the agreement. As, where in consideration of 10*l.* to be paid in ten days, A. agrees to execute a lease to B. at the end of that time, and to do certain repairs before the executing of the lease, but possession is to be given immediately, and B. enters and pays the 10*l.* immediately, and the repairs not being done, B. some time after the ten days, quits possession, he cannot consider the contract as rescinded, and bring an action for money had and received. Where a contract is rescinded, the parties must be put in the same situation as before.

THIS was an action for money had and received; tried before Lord ELLENBOROUGH, C. J. at Westminster, after Trinity term, 1804. The plaintiff and the defendant entered into an agreement on the 31st of August 1802, as follows. "The said T. Silk, in consideration of 10*l.* to be paid at the time of the executing of the lease herein after mentioned, and for the other considerations herein mentioned, agrees to and with the

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SILK.

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said *S. Hunt*, ~~that~~ the said *T. Silk* will, within ten days, grant to the said *S. Hunt*, a lease of a certain messuage, situated in *Greville Street, Hatton Garden*; to hold the same from the 29th day of *September* next, for and during the term of — years; but it is agreed that possession shall be given immediately. The *defendant* promises and agrees to take away certain brick-work, and replace a certain window; he also further agrees, that the premises, fixtures, and things shall, at the time of the executing of the lease, be put in good repair and condition." *Hunt* thereupon took possession, and paid the 10*l.* before the ten days had expired. At the end thereof, nothing was done to the house, and he said, if it was not put into complete repair he should quit; which he accordingly did, and then brought his action; and his counsel contended, at the trial, that the contract was rescinded by the failure of *Silk* to perform it, and that the 10*l.* might be recovered in this form of action, as money paid upon a consideration which failed; but his lordship directed a nonsuit, thinking the agreement could not be considered as at an end.

READER now moved for a new trial, and cited *Giles v. Edwards*,* to shew that where an act is to be done by each party under a special agreement, and the *defendant*, by his neglect, prevents the *plaintiff* carrying it into execution, the *plaintiff* may recover any money he paid under it, in an action for money had and received; and contended that the same principle governed this case, for that if the *plaintiff* had not paid the money at the end of the ten days, yet the *defendant* could not have maintained an action for the 10*l.* without averring that he had put the house in repair. The payment of the money, before the time, was not a part execution of the contract, so as to prevent it from being recinded, on failure of performance on the other side. And unless the *defendant*

* 7 Term Rep. 181.

performs his part, by putting the house in repair, the plaintiff is not bound to execute the leases, and the contract has wholly failed.

1804J

HUTCHINSON
versus
SILVER

LORD ELLENBOROUGH, C. J. "In the case of *Giles v. Edwards*, there was an agreement to take cord wood, which was to be coaled and cleared off the premises by *Michaelmas*, and part of the money was to be paid in March preceding, and, by the terms of the contract, the party was allowed to proceed in the cording of the wood, after the payment of the money. In this case, you are permitted to enter, and then to pay the money at the end of ten days, on executing the lease, and the repairs are to be done by that time. Then you enter and pay the money immediately, and dispense with his performing his agreement at the time appointed. If you are to understand the money to have been paid upon condition that he would put the house in repair, in due time, then you might perhaps rescind the contract, upon failure thereof, at the end of the ten days, but you must make your stand there, and not proceed to a further continuance in the house under the agreement. You have, in fact, the benefit of the ten days occupation, and after that time there is no rescinding of the contract. You ought, in this case, to be able to put the other party in the same situation as if the contract had not been made. If you are not to rescind it immediately upon the expiration of the ten days, what period is to be fixed, or may it be done at the end of twelve months? The entering and paying the money before the time was your own fault."

LAWRENCE, J. "If the 10l. was to be paid in consideration of the repairs, and no repairs were ever done, that might perhaps raise a question."

READER. "The agreement is in consideration of the whole of the subsequent contract."

1802.

Hotham
versus
Salk.

LAWRENCE, J. "But the contract cannot be rescinded, unless the parties can be put in the same situation. They were so in *Giles v. Edwards*, but they are not so here."

RULE NISI REFUSED, even though it was prayed upon payment of costs.

GREGORY against BADCOCK.—Nov. 9.

In assumpsit the plaintiff declared that, in consideration that he would permit the defendant to occupy a house for four weeks, at ten guineas per week, the defendant undertook to pay "the said rent," and the plaintiff recovered, though the defendant never took possession, and, though no other promise was proved than that the defendant said she would take the house upon the terms. The said rent, in such a declaration, means the said sum gross. The letting and hiring is evidence of an express promise sufficiently to enable the party to bring assumpsit.

GREGORY
versus
BADCOCK.

IN ASSUMPSIT, the plaintiff declared on an agreement, for that whereas, in consideration the plaintiff, at the special instance of the defendant, agreed to let to her and permit her to occupy a certain ready-furnished lodging-house and premises called *Russell-house*, in *Brighton*, for four weeks, at ten guineas per week, she then and there undertook to pay the rent aforesaid. There were other counts for use and occupation. At the trial before HOTHAM, B. at the last assizes for *Sussex*, it did not appear, that the defendant ever took possession under the terms of this agreement, nor was there any express undertaking to pay rent *eo nomine*. The evidence given was that the defendant, on coming out of a room with the plaintiff, said she

would take the house at so much. The *defendant's* counsel contended that *assumpsit* would not lie for rent without an express agreement proved, to pay rent; though debt would lie for it, and that in this case there was no evidence of such an express promise. The learned Judge thought the agreement sufficiently proved, and the jury gave a verdict for the *plaintiff*.

1801
GREGG
KING
LAWSON

BEST, Serj. now moved for a new trial, and in arrest of judgment. He said that this was stated as an agreement to pay *rent*, and not a sum in *gross*, and *assumpsit* would not lie for rent unless there was a positive express promise to pay the rent.

LORD ELLENBOROUGH, C. J. "That is, unless there is an express *taking*; it is understood if the one takes and the other lets, for then the law raises a promise."

BEST, Serj. "It is, I submit, not so in *assumpsit* for rent, though in debt it may be."

LORD ELLENBOROUGH, C. J. "Then this *taking* is evidence of a promise."

BEST then cited *How v. Norton*,* and said that in *Johnson v. May*,† the court held that *assumpsit* would not lie for rent, without an express promise similar to a covenant, where the lease is by deed.

LAWRENCE, J. "What do you call a letting but a contract on the one part to take, and on the other to pay the *rent*."

LORD ELLENBOROUGH, C. J. "Admitting what you

* *Siderfin*.

† 3 Lev. 150.

1804

GARDNER
deftus
Pitcock.

urge, for the sake of argument, yet is not that which has passed in this case evidence of an express promise?"

BEST, Serj. "If so, every lease would be a promise to pay rent without a covenant for the express purpose, and debt or covenant might be maintained for rent upon it without occupation."

LORD ELLENBOROUGH, C. J. "That argument does not apply, because upon a lease by deed, you can presume nothing which is not expressed in it."

Upon the point, as to arrest of judgment, BEST suggested, that it was an agreement to pay rent, and not a sum in gross, and therefore bad in assumpsit; but, besides that the court did not seem directly to admit the application of the cases cited; they said that the words *undertook to pay the rent aforesaid*, being taken with reference to the former words *at ten guineas per week*, must be taken to mean a sum in gross.

RULE NISI REFUSED.

THE KING against the TRUSTEES of DAGGER-LANE
CHAPEL.—Nov. 12.

The trustees of a chapel of Dissenters, which, for want of a pastor, had been without a congregation, engaged with a new pastor for a year, at a salary; he gave notice in the papers of opening the chapel, and, on the first day of opening, gave notice to the congregation there, that they should proceed to an election of a pastor after divine service that day, and ac-

accordingly took votes. Upon being dispossessed by the trustees, after the year, he applied for a mandamus, to be restored, alleging that he was elected by the congregation for life. The court refused to grant it, on the ground, that, supposing there was a competent body to elect, there was not sufficient notice given of the election; and, therefore, they left the party to try his right in an action. To found such an application, there must be a probable colour of an election laid before the court.

1804.

ON a rule to shew cause, why a *mandamus* should not issue to the defendants to restore one *Nicholson* to his office of pastor of *Dagger-lane* chapel, in *Kingston-upon-Hull*, *Nicholson*, in his affidavit, stated that he had formerly assisted one *Green*, who was the former pastor; that *Green* dying, and there being no person to officiate, one of the trustees, with the consent of others, wrote to him to come from *London* to settle there, at a salary for a year; that he accordingly went down, that a congregation was collected by means of an advertisement in the *Hull* paper; that a meeting was held, and, by the congregation, in whom the right of election vested, he was chosen pastor, and he considered himself as chosen for life. The emoluments of his office arose partly from the rent of the pews, and partly from a house belonging to the chapel. And an action had been brought against the trustees to recover the rents of the houses, which was pending at the time of applying for this *mandamus*. On the part of the defendants, it was sworn that one *Fees*, a trustee, applied to him to come down, and the trustees engaged him for a year, from the 5th of *April*, 1803, saying, they presumed the congregation would approve of him; that he was to be paid 30*l.* a year, and, when all the pews were let, only 20*l.*; that the trustees had only the power of nominating a pastor; but the election was in the pew-holders, who paid rent quarterly, and paid a quarter in advance, and subscribed to certain articles; that other persons were permitted to attend divine service, who were called *Hearers*, but had no right of elec-

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tion ; that the chapel was established in 1698, and that it was not held for life by any pastor, but only during the will of the congregation ; that at the time of *Nicholson's* coming, there had not been any service for a long period, and there was, in fact, no regular congregation or body of pew-holders ; that notice was given by advertisement, that the chapel would be opened on the then next *Sunday*, the 24th of *April* ; that a congregation met, and that, from the pulpit, *Nicholson* announced that, after divine service of that day, they should proceed to elect a pastor ; that though five out of six of the acting trustees were then present, they did not vote in his election : that there were thirteen trustees in all : that the chapel belonged to a congregation of *Presbyterians*, whereas it was stated in *Nicholson's* affidavit that they were *New Jerusalemites* ; that *Green*, the former pastor, had not been elected for life ; and that the trustees, soon after *Nicholson's* coming to *Hull*, gave him notice that they should not engage with him, at the end of the year, and offered to pay him 30l. and a quarter's salary to get rid of him, before he brought his family to reside there.

PARKE and WIGLEY, for the *defendants*, shewed cause, and cited *Rex v. Jotham*,* and *Rex v. Barker*,† and said that *Nicholson*, having been once in possession, and consequently having the means of trying his right by an action, must make out a clear title in order to be restored, or the court would not interfere ; though it might be otherwise where the party had never been in possession, and the *mandamus* was the only means of trying his right. They insisted that he shewed no title, and was not duly elected.

ERSKINE and DAMPIER, *contrà*, contended that he was duly elected, and ought to be restored ; and said that

* 3 Term Rep. 575.

† 3 Burr. 1265, 1379.

an issue on the *mandamus* was more convenient to try whether *Nicholson* was duly elected or not, and for what time he was so elected.

1804.

 Rex
 versus
 TRUSTEES of
 DAGGER-
 LANE CHAPEL.

Lord ELLENBOROUGH, C. J. " This application is for a *mandamus* to restore a minister to his office, and necessarily proceeds upon the supposition that he has been once duly elected; he must lay the foundation of his application for a *mandamus*, therefore, on a probable ground, for the court to see that there has been a due election: without it, the court will not interfere. But the invitation down was not an election; it was merely for the purpose of probation. The hiring for a year, by the trustees, whether it took place before or after the 24th of April, 1803, was not an election, for the purpose of the present case. So far at least is clear. Then as to what passed on the 24th of April, 1803, can that be called an election? To constitute it so, there must be notice of it to the electors. But what notice was there here? It was only a notice, given by himself, of an election to follow immediately. I will even assume, though it may be contrary to the fact, that it was with the approbation of the trustees, yet it was not a good notice, being in fraud of those other electors who might have been there, if they had been apprized of it. Therefore, supposing there existed, at the time, a body competent to elect, which is not clear, yet this is no election. The party is even not yet without remedy, if there has been a due election in fact, because he may try his right by an action; and therefore the court will not interfere by *mandamus*. The party has not laid before us any such probable colour of an election as to induce us to grant it."

GROSE, J. and LAWRENCE, J. assented, stating the same ground for their opinion.

LE BLANC, J. observed, if the affidavits had left it doubtful whether there had been a good election or not,

1804.

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LANE CHAPEL.

or for what time, the court might have given the party an opportunity to try that upon an issue. And he said, "The history of the congregation explains the affidavits. The chapel, having been shut up, had lost its congregation; the trustees in whom the legal estate vested were desirous of opening it; they engaged *Nicholson* for a salary, for a time within which they might obtain a congregation who could elect him to hold it for a longer time. Then what passed could not be an election; for a casual meeting could not be a congregation for that purpose."

RULE DISCHARGED.

JALASSIO against LONGHURST.—Nov. 13.

The exception in the Lords' Act, 32 Geo. II. c. 28, s. 24, applies only to persons having taken the benefit of general insolvent acts; not to persons discharged under the Lords' Act. The former cannot have the benefit of the Lords' Act; the latter may.

JALASSIO
VERSUS
LONGHURST.

THE defendant came up to take the benefit of the *Lords' Act*, 32 Geo. III. c. 28. ESPINASSE opposed his discharge, upon the ground that he had taken the benefit of an *Insolvent Act* before; from his answers, it appeared at first that he had been brought up and discharged under the *Lords' Act* before, and this ESPINASSE urged as an objection, before GROSE, J. who was then the only Judge in court. The clerk of the rules reported to the learned Judge that in the case of one *Annesley Shee*, it was held that the exception in the *Lords' Act* applied only to general insolvent acts, and of that opinion was the Judge. But, it

afterwards appearing that the *defendant* had been discharged under a general insolvent act,

HE WAS REMANDED.*

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JALOUSIE
OFFICE
LONDRETT.

COLLINS against Lord MATHEW.—Nov. 13.

Nul tiel record is no plea to debt brought here, on a judgment in the court of Exchequer in Ireland.

DECLARATION by original in debt, on a judgment in the court of *Exchequer* in Ireland. "Whereas the plaintiff heretofore, to wit, in *Hilary* term, 44 Geo. III. in

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* *Ex relatione* J. ESPINASSE. Of the case cited by Mr. Card, as above, I have the following note, which corresponds with his note. Monday, Feb. 6, 1804. *Chilton v. Shee*, B. R. Shee was brought up to be discharged under the *Lords' Act*; and on being asked whether he had been discharged before, he said he had been discharged in 1804. ABBOTT then cited the statute 32 Geo. II. c. 28, s. 21, "Provided that no person, who has already taken, or shall hereafter take, the benefit of any act for the relief of insolvent debtors, shall have or receive any benefit or advantage under this act, or be deemed to be within the meaning thereof, so as to gain any discharge, unless compelled by any creditor to discover and deliver up his or her estate and effects."

ESPINASSE, *contra*, said, that, in *Michaelmas* term, he had taken a similar objection, before LAWRENCE, J. who overruled it, and said, that it applied only to persons discharged under that or any similar act, but not to any general insolvent act.

But by GROSE, J. "That cannot be the construction; the words are very clear. The MASTER then shewed him a case, in which he had ruled as was contended for by ABBOTT."

The prisoner was therefore remanded.

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the court of our said lord the king, of *Exchequer*, then and there,* holden, before the barons of our said lord the king, of his said *Exchequer*, at *Dublin* in *Ireland*, by the consideration of the said court, recovered against the said *Francis Lord Viscount Mathew*, as well a certain debt of —l. sterling money, being *Irish* currency, as 50s. 2d. being of the currency aforesaid, which were then and there adjudged to the said plaintiff with his assent, as well for his damages which he had sustained on occasion of detaining that debt, as for his costs and charges, &c. whereof the said *Francis Lord Viscount Mathew* is convicted; as by the record and proceedings thereof, remaining in the said court of our said lord the king of his *Exchequer*, at *Dublin* in *Ireland* aforesaid, more fully appears, to wit, at *Westminster*; which said judgment still remains, in the same court, at *Dublin*, in *Ireland*, in its full force, &c. where by an action hath accrued, &c."

PLEA. "That there is no such record of the said supposed judgment, in the said declaration mentioned, remaining in his said majesty's court of *Exchequer*, at *Dublin*, in *Ireland*, aforesaid as &c. and this he the defendant is ready to verify, wherefore, &c." Demurrer, with causes, that the plea of *nul tiel record* is not pleadable to an action of debt on a foreign judgment, or, if pleadable at all, it ought to have concluded to the country, and not with a verification, &c. Joinder in demurrer, &c.

WOOD, for the plaintiff, cited *Walker v. Whitter*,† in which the plea of *nul tiel record* to an action on a foreign judgment was held bad. This was, he said, as a foreign judgment; for the House of Lords cannot have up this judgment by *certiorari*; neither can this court have the inspection of the record; it can only be proved as matter in pais by an examined copy.

* There was no place previously mentioned in the copy from which this was taken, except *Middlesex*, in the margin.

† *Doug. 1.*

LAWES, for the *defendant*. "This, since the *Union*, is matter of record, and not matter *in pais*; it is a record of one of his majesty's superior courts. And this plea is well concluded with a verification, for the party here selects a particular fact on which he relies. This is like debt on escape, where the judgment is one of the necessary facts, and the want of a record may be taken advantage of upon *nil debet*, yet *nil tiel record* may also be pleaded to it."

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Lord ELLENBOROUGH, C. J. "It is true, this is, in fact, matter of record, but it is not in the power of the court to have it proved by inspection of the record in the usual way; we cannot obtain it by *mittimus*, or any other process; it is, therefore, to be proved only by an examined copy, as matter *in pais*; and there not being any new matter introduced in the plea, nor even the selection of a particular fact, this being the single fact alleged as a ground for the action, the plea should have concluded to the country. But whether that be so or not, *nil tiel record* cannot be pleaded to this judgment."

GROSE, J. "I thought this was a *sham plea*."

LAWRENCE, J. and LE BLANC, assented.

JUDGMENT FOR THE PLAINTIFF.

DAY-RULES—Nov. 13.

Where an attorney, a prisoner, applies for day-rules, in order to transact business in causes commenced before his confinement, he should state in his affidavit what causes.

COMYN having applied, on the behalf of an attorney, *De-arrested*, a prisoner, for additional day-rules, in order to trans-

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act some business in certain causes in which he was concerned before his confinement, the court granted them reluctantly, and said, that if he applied again, he should state in what causes, specifically, he was concerned.

WOOLNOTH against MEADOWS.—Nov. 13.

Declaration that the defendant, maliciously intending to subject the plaintiff to the penalties against persons guilty of the horrible and detestable crime of, &c. said of the plaintiff, that "his character was infamous; he would be a disgrace to any society; if he was inrolled in the Royal Society, he would cause his name to be erased; delicacy forbade him to make a direct charge, but it was a male child of nine years, that complained to him;" meaning that a male child of nine years old had complained of an unnatural crime committed by the plaintiff upon such child; with an averment that the defendant uttered the words with intent to convey, and they were by the persons to whom, &c. understood to mean that the plaintiff had committed that horrible crime of, &c. Held sufficient, without a colloquium more fully explanatory; for the words are sufficiently plain without an innuendo.

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THE declaration, after the usual introduction in case for slander, stated, that the defendant had been proposed as a volunteer, at a certain society called the Society of Engravers, at the time of speaking the said words, assembled for the purpose of forming a corps of volunteers, to wit, at, &c. yet contriving, &c. to subject the plaintiff to the pains and penalties, &c. and to cause it to be believed that the plaintiff was a person of unnatural passions and propensities, and guilty of the crime aforesaid, &c. on, &c. at, &c. in a discourse with the said certain person, then and there being members of the

said society, wickedly, falsely, and maliciously spoke these false and malicious words of and concerning the said *plaintiff*, having been proposed a volunteer as aforesaid, that is to say, his character, meaning the character of the said *plaintiff*, is infamous; he, meaning the said *plaintiff*, would be disgraceful to any society; whoever proposed him, the *plaintiff*, must have intended it as an insult; I will pursue him, the *plaintiff*, and hunt him from all society; if his name is inrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy; delicacy forbids me, meaning delicacy forbade him, the *defendant*, from bringing a direct charge, but it was a male child of nine years old who complained to me (meaning that a male child of nine years old had complained to the *defendant* of some unnatural crime, committed by the *plaintiff* upon such child;) and the *plaintiff* avers, that the words so uttered and published by the said *defendant* were so uttered with the intent and meaning to convey, and that the same were, by the said persons in whose presence they were uttered and published, understood, believed, and taken to convey, that the *plaintiff* was a person of unnatural propensities, and had committed the horrid and detestable crime of, &c. There were several other counts to the like effect. Pleas: 1st, not guilty; 2dly, as to the words in the first count, that a certain male child of nine years old, to wit, one J. K. M. did complain to the *defendant* of an unnatural crime, before that time committed by the *plaintiff* upon such male child; for which cause, &c. 3d plea very similar, viz. that the said child complained of the committing the said crime in the declaration mentioned; 4thly, that the said *plaintiff* did commit upon and with a certain male child, to wit, &c. the horrid and abominable crime in the first count mentioned, and he complained to the *defendant*, &c.; 5th plea, to all the words in the other counts, a plea similar to the third plea; 6th plea, to all the counts the same as the fourth plea.

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The *plaintiff* in his replication joined issue upon no guilty ; and demurred to the second and third pleas with causes " that the *defendant* hath not justified or answered the special matter in the said first count ; nor averred that the complaints, in the said pleas mentioned, were true, or that the said *defendant* believed the same to be true ; and the matters in the said pleas respectively do not amount to any traverse of the said first count, but are consistent therewith and afford no justification or excuse of the malice of the said *defendant* in the said first count stated ; and the matters attempted thereby to be put in issue, are immaterial." To the fourth plea, *de injuriâ suâ propriâ* ; to the 5th plea, demurrer, with the like causes as above ; to the 6th plea, *de injuriâ suâ propriâ*. Joinder in the demurrers and the issues.

SCARLETT, for the *plaintiff*, in support of the demurrers, cited Lord *Northampton's* case,* and *Davis v. Lewis*,† and relied upon the distinctions there taken, that it is not a sufficient justification that the party who reports slander spoken by another, has actually heard what he reports, but he should, at the time, state the person from whom he has heard it ; and his stating such person's name afterwards in his plea, is not a justification. That the better reason for this doctrine is, that he who so reports slander, stating the author of it at the time, does not give approbation to it, by adding to it his own authority. He also contended that, upon the same principle, the *defendant*, in his plea, should acknowledge that the report was false ; whereas, here, the *defendant* neither says that he did not himself believe the statement of the boy, nor that he did not mean to repeat it as giving any credit to it.

BURROUGH, for the *defendant*. " First, The pleas are a sufficient answer to the action ; and, secondly, the *declaration* itself is defective. As to the declaration, it does

* 12 Co. 135.

† 7 Term Rep. 17.

not, in any one count, contain an averment, that no boy made such a complaint. In former times this was required, and it let the *defendant* in to prove the truth of the words upon the general issue. This is still requisite upon actions for words spoken by another person originally, and repeated by the *defendant*. Thus, in *Crawford v. Middleton*,* where the *defendant* met one going to gaol, he said he had met one, who told him that he should follow him soon, and bring the *plaintiff* thither for stealing a mare. These the words were laid to be spoken falsely and maliciously, as it should seem from the report, and yet it was held by three Judges, that the declaration was bad, because it did not state, *ubi, re verâ*, no one met him on the road, &c.

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LORD ELLENBOROUGH, C.J. "*Twysden*, C.J. in that case, differed from the rest of the Judges, and his opinion seems to have been right; for, according to Lord *Northampton's* case, which was decided upon great deliberation, it would be immaterial whether any one met him or not, since he did not state his name. All the modern cases shew, that it is not necessary to deny the truth of the scandalous words in the declaration, otherwise than by stating them to be spoken falsely and maliciously."

BURROUGH then contended, that the scandal was not alleged with proper innuendoes and a sufficient *colloquium*, to make it appear that the words used were libellous and were meant to convey a charge of an *unnatural crime*. They were words of abuse; but for any thing that appeared, a male child of nine years old might have made a complaint of some conduct towards a woman, which delicacy might have forbidden the *defendant* to name; and, in that sense, the words would not be actionable.

SCARLETT, in reply, repeated Lord ELLENBOROUGH'S

* 1 *Levinz*. 82.

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observations upon the case of *Crawford v. Middleton*; noticed that the ancient doctrine of construing words in *mitiori sensu*, is exploded; cited the cases of *Baker v. Pearce*,* and *Phillips v. Kingston*,† to shew the impropriety of that doctrine; and lastly contended, that the words, importing in the apprehension of all men of common sense, a charge of felony, were actionable, and were laid with sufficient averments and innuendoes. He added, that there was an averment, that the *defendant* used the words, with an intention to have it believed, that the *plaintiff* was guilty of an unnatural crime; and that the *defendant*, by his plea in justification, must be taken to have admitted that averment to be true, and that such was his intention.

Lord ELLENBOROUGH, C. J. "This case comes before the court, upon a demurrer to several pleas, which attempt to justify the speaking of certain defamatory words, by stating, that a child of nine years old did, in fact, make the charge against the *plaintiff* conveyed by those words. But these pleas do not state the name of the child. They are in effect abandoned, as they certainly fall within the principle of Lord Northampton's case; by which it is held necessary for a person who repeats slander spoken by another, to disclose his name, in order to found an action against that other person; and that he must disclose the name when he repeats the slander, and is too late to justify himself by doing it in his plea. The question now before the court must, therefore, wholly turn upon the sufficiency of the counts in the *plaintiff's* declaration. As to the objection, that it ought to be stated, that no person had made the statement which is the subject of the slander, that is completely answered by Lord Northampton's case. That case shews that such an averment would have been unnecessary, because if the statement had been made, it would

* 1 L. Raym. 949.

† 1 Vent. 117.

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have been immaterial, unless he had stated who told him of it, at the time of speaking the words. Recourse must therefore be had to the second objection; which is in effect, that these words, construed by the innuendoes, do not imply a charge of felony. I admit that an innuendo cannot extend the meaning, and can only explain what has gone before, by ascribing to the words, under the circumstances of the *colloquium* set forth, that meaning which they would naturally bear, in the minds of the bystanders. Upon this principle we are to consider in what sense the words here used are to be construed, and whether the *innuendoes* have assigned to them their proper meaning. The first part of the charge against the *plaintiff*, is, "that his character is infamous." As to this, there may be various degrees of infamy, but the next clause explains it to be of such enormity, that "he would be a disgrace! in any society," and that he would pursue him and hunt him from all society. "Delicacy, it is said, forbids him to state the direct charge;" but "it was on a male child of nine years old." It was, therefore, something which might be the subject of a charge; it was something which violated morals, and rendered him unfit for all society; which would be a motive to pursue him even through the world. Are we to understand any person's meaning, if the import of these words is not sufficiently plain? We are not to look for astute distinctions, as to the meaning of the words, upon a demurrer, which admits the speaking, and does not go to issue upon the malice; we are not to construe them *in mitiori sensu*; but the common understanding of mankind is to be applied to them; and should we not violate all common sense, if we understood them as imputing less than a criminal act, for which, if true, the *plaintiff* might be punished? But it does not rest here. There is an averment, on this subject, which, without violating the rules concerning innuendoes, would, if it went to trial, put the meaning beyond a doubt. It is averred,

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that the persons who heard him, understood him to convey a charge, that the *plaintiff* was a person who had committed a crime against nature, the very terms which the law itself uses as descriptive of one of the worst of crimes. On that averment, the *plaintiff* must not only have shewn the words to have meant so, but that these persons did understand him so. On this averment, he might have gone into evidence of other words, to shew that the *defendant* meant so; and he must have shewn that the by-standers understood them so."

GROSE, J. "As to the declaration, I fully agree, upon the first point, with the answer made to the objection that the truth of the statement is not denied. The second question is, then, the most material. I threw out, in the argument, that the court must understand the words as the common people would. When I read them I thought it would be impossible for any two persons to differ in opinion about what was meant by them. You may comment upon them, indeed, but it comes at last to the question—what was any man to understand by them? 'Tis clear, that no man would understand them, but as a charge of a criminal nature. Under the late determinations, these pleas cannot be supported: for in the late cases it is decided, that, if a man would justify the repetition of ill words spoken by another, he must, at the time, set out the words and the name of the person who gave the slander."

LAWRENCE, J. "I agree in the opinion already delivered, as to the first point. With respect to the pleas, it seems on the authority of Lord Northampton's case, and the subsequent cases, that they cannot be sustained. The rule there adopted is a good one. If a person will take upon himself to report what others say, he should, at least, give the party the means of bringing an action against somebody. And, here, if the *defendant* had stated the boy's name, the *plaintiff* might have had his action against him. But now the slander goes through the

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WOUNDED
TERRIBLE
MISADVENTURE

world, and, if he has no action against this person, he has no action against any one else, and his character is defamed without remedy. I agree, on the other point, with my brother GROSE, that the question is, whether, according to the common understanding of mankind, these words import a criminal charge? In *Cooper*, 275, Lord Mansfield takes that as the true doctrine upon the meaning of words. Now let any one read these words, which I do not repeat, because my lord has commented upon them, and can any one doubt of their meaning? The cases as to imputing to words a mild sense, have been argued upon rather too far. It is supposed that the declaration does not state the meaning of the words sufficiently plain; but if it had stated a charge made of an unnatural crime in terms, and not in gross language, would it have been necessary to have stated the unnatural crime specifically in gross words, by innuendo. Yet it might have been argued, that all crimes are contrary to a well ordered state of nature. But, notwithstanding it may be so, yet it surely could not be necessary to explain the meaning of an unnatural crime in gross terms."

LE BLANC, J. "I cannot read these words, commenting on every one as I go along, without understanding them in the sense put upon them by the declaration. We are not, in these days, to inquire whether you may not affix a meaning to them different from that which the party puts who brings the action, and which the common people would put: but considering the circumstances under which they are stated to be spoken, and the epithets which the speaker uses, who repeats the charge, it is impossible to understand them otherwise.

JUDGMENT FOR THE PLAINTIFF; ON THE DEMUR-
REL TO THE SECOND, THIRD, AND FIFTH PLEAS.

1804.

FRANCO against DUBOIS.—Nov. 14.

A. and B. interchangeably accept accommodation bills; B.'s bills are discounted with C., who, upon their becoming due, agrees to renew them; but A. having fallen into discredit, C. does not take his name to the bills, but draws for the amount on B. only: before these new bills become due, A. becomes bankrupt. *Semble*. B. might have proved under A.'s commission, for the former accommodation bills, this being a payment, as it were, of those bills. B. having arrested A. for the amount of the bills paid to C. after A. obtained his certificate, the court discharged A. upon filing common bail.

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RULE to shew cause why the *defendant* should not be discharged out of custody, upon filing common bail; and why the bail-bond should not be delivered up to be cancelled, the *defendant* having been a bankrupt and having obtained his certificate.

ERSKINE, for the *plaintiff*, in shewing cause, stated, at first that the material facts in the *defendant's* affidavit, on applying for the motion, were all denied by the *plaintiff*, and, therefore, objected to going into the case. The *defendant*, in his affidavit, had suggested, that the *plaintiff's* demand might have been proved under his, the *defendant's* commission of bankruptcy; it having arisen upon an accommodation-bill transaction between the *plaintiff* and the *defendant*, which bills the *plaintiff* was obliged to pay; but that though he ought to have paid the bills before the bankruptcy, he delayed to do it till after, in order not to prove under the commission. He also suggested that the *plaintiff* proved a debt of 6000*l.* under the commission, which included the present demand. This, in the main points, the *plaintiff* denied in his affidavit. However, GIBBS, for the *defendant*, consented to support the motion only upon the case stated in the *plaintiff's* affi-

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avit. Whereupon the facts appeared as follows : There was an exchange of paper between the *plaintiff* and the *defendant*, to exactly or very nearly the same amount on each side, till *February*, 1801. At that time, the acceptances remained in the hands of the persons who discounted them; there were then bills to the amount of 6000*l.* in the hands of Mr. *Wilberforce Bird*, drawn by the *defendant* and accepted by *Franco*. These bills the *plaintiff*, *Franco*, renewed by accepting bills drawn by *Bird*, with the consent of the *defendant* and his partners; "and which were no otherwise for the accommodation of the *plaintiff* than for the purpose of taking up the former bills." The original bills, for which acceptances were given by the parties interchangeably, became due before the bankruptcy of the *defendant*; *Bird*, at that time, agreed to renew them, but, instead of taking bills drawn by the *defendant* on the *plaintiff*, he took bills to the like amount, drawn by himself on and accepted by the *plaintiff* only, because the *defendant's* house of trade had fallen into discredit. *Bird*, however, kept the bills drawn by the *defendant*. These renewed bills, with the acceptance of *Franco* upon them only, were not paid till after the *defendant's* bankruptcy, and, therefore, the *plaintiff* was advised, that he could not prove the amount under his commission. "So far from delaying payment merely to enable him to bring the present action, he went to trial in several actions brought against him by the holders of the bills, and endeavoured to avoid the payment of them, by shewing, that they were made for the accommodation of *Dubois* and Co. and for no other consideration, and that the holders took them with knowledge thereof. The *plaintiff*, therefore, denied that he postponed the payment fraudulently for the above purpose.

ERSKINE and GARROW, for the *plaintiff*, cited *Buckler v. Buttivant*,* and *Cooke's Bankrupt Laws*, p. 118, edit.

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ultim; and contended that upon this statement of the facts of the case, the *plaintiff* could not have proved the amount of the bills drawn by *Bird*, and accepted by him, the *plaintiff*, until he had paid them; which was not till after the commission against the *defendant*.

LORD ELLENBOROUGH, C. J. “*Franco*, by renewing the bills with *Bird*, became liable to him; and was not this a payment, as it were, of the former accommodation bills?”

GIBBS, for the *defendant*, put the case upon that ground, but there then arose some doubt upon the affidavits as to what bills the above transactions related, and whether there was not more than one transaction concerning these renewed bills. This did not appear clearly from the *plaintiff*'s affidavit, and part of the *defendant*'s affidavit was, as the court thought, not sufficiently denied by the *plaintiff*.

THE COURT expressed an opinion, that, if the bills accepted by the *plaintiff* and drawn by *Bird*, were in consideration of the former accommodation bills, then the *plaintiff* might proceed against the *defendant* on the former cross acceptances, or might take others in lieu of them. But no other or new cross acceptances being given by the *defendant*, the acceptance of bills drawn by *Bird*, the holder of the former bills, was as a payment to him, at that time. As the present motion would not prevent the *plaintiff* from proceeding to trial upon the merits, the court made

THE RULE ABSOLUTE to discharge the
defendant, upon filing common bail

HESSE against STEVENSON.—Nov. 14.

1804.

In the Common Pleas.

In an action of covenant, where the defendant is not arrested, if the plaintiff obtains judgment and has execution, by *fi. fa.* for part of the damages, he may hold the defendant to bail in an action upon the judgment for the residue.

THE plaintiff, having brought an action of covenant against the defendant, for not making a good title to him of certain shares in the *straw-paper manufactory*, sold to the plaintiff, recovered a verdict, with damages, 1200*l.* For this sum he sued out a *fi. fa.* and levied a part of the amount; and for the residue he arrested the defendant, in an action upon the judgment.

HESSE
versus
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SHEPHERD, Serj. obtained a rule to shew cause why the proceedings should not be set aside for irregularity, on the ground that the plaintiff having on record elected to proceed on the original action by issuing a *fi. fa.* could not commence a new action upon the judgment. Or if the proceedings were not irregular, then to shew cause why the defendant should not be discharged out of custody, upon filing common bail. He cited *Dyer*, 299. b. 34.* “In debt, the plaintiff declared on a recovery, of costs and damages in a writ of entry, *per quod actio accretit*: the defendant pleaded in bar, that the plaintiff, after the judgment, immediately sued out an *elegit*, and delivered the writ to the sheriff, who served the writ and delivered a moiety of the lands extended to the plaintiff, without shewing the return of the writ. Q. whether this is a bar? And so it seems it is; for the plaintiff can-

* 1 Roll, 601.

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not vary, in pursuing his execution, from that of which he has made an election of record. 1 Ro. Abr. 601. C. 4. 67. Co. 59. a. Br. Execution." And so in Ro. Abr. 601, the same point is stated, and the reason is given "because the *plaintiff* has made his election of record."

BAYLEY, Serj. now shewed cause, and cited *Glascow v. Morgan*,* where in a debt on a judgment, for 1000l. the *defendant* pleaded, "that the *plaintiff* had sued out three several *elegits* on the said judgment, in several counties on one of which the sheriff returned, that he had levied of the goods of the *defendant* 500l." to which the *plaintiff* demurred. The case was argued three several times at the bar, and it was held, that the levy of the goods only was no bar, but that he may have other *elegits*, and take the lands for the residue. But when the *elegit* is sued and lands are taken, and the return is filed, he shall not have another execution. And as to that, that it does not appear what is become of the other *elegit*, it should not be understood that any lands are extended on them, it not being shewn; and, if there are other lands extended, the *defendant* ought to have shewn that, in pleading. Et Pasch. 16. Car. 11. judgment was given, for the *plaintiff* by the whole court; on which the *defendant* brought a writ of error immediately, as I have heard, but what became of it I never heard." He cited *Lancaster v. Fielder*,† where after an *elegit* on which the goods only were levied, the *plaintiff* levied a *fi. fa.* He also cited a precedent drawn by Mr. Wood, in *Wentworth's Pleadings*, vol. 7. p. 83. of a declaration upon a judgment, after a levy of part by a *fi. fa.* which, though not an authority, yet proved the opinion of the best modern pleaders on the subject.

SHEPHERD and ONSLOW, Serjeants, in reply, relied upon the authorities in *Dyer* and *Rolls. Abr.* and the reason

* 1 Lev. 92.

† 2 Lord Raym. 1452.

there given, that the *plaintiff* had made his election of record; and said that it did not appear, but that the case in *Levinz*, might have been reversed upon error. They contended also, that if the *defendant* was not entitled to the former branch of the rule, he was to the latter, which was wholly within the discretion of the court.

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MANSFIELD, Chief Justice. "On this motion, I should be glad, if I could, to release the *defendant* out of custody; and if, upon further consideration, you can find any case to warrant his being discharged, you will mention it again. But, at present, it does not seem possible for the court to discharge the *defendant* upon common bail. The question is, whether the *plaintiff* can bring an action upon a judgment for what remains unsatisfied after an execution by a *fi. fa.* But that question is not proper to be discussed upon a mere motion of this kind; it is properly the subject of a plea, as in the case in 1 *Levinz*, 92; and we must take it that the ultimate decision there was against the *defendant*; for it is hardly to be supposed that a solemn decision, after three hearings at the bar, should be reversed without any notice being taken of it, when the reporter mentions that in fact a writ of error was brought. It is most probable therefore that the writ of error was abandoned. Upon principle it should seem so. For, in ordinary cases if a *defendant* paid a part of the money, though it was the next day after the judgment signed, that would be no reason why an action should not be brought on the judgment. What then is the effect of the *fi. fa.* but this, that a part of the *defendant's* effects are taken and sold to pay a part of the debt? The levying a *fi. fa.* also does not affect the *plaintiff's* right to have any other kind of execution, and he may sue out either another *fi. fa.* or an *elegit*; and after an *elegit*, if he does not take the *defendant's* lands, he may have a *capias ad satisfaciendum*. But it is even no fair conclusion to say that, because after an *elegit*, which is not returned, he cannot bring an

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action upon the judgment, so neither can he do so after another species of execution, in which he has not obtained full satisfaction of the debt. The case of an *elegit*, under those circumstances, is very distinguishable; because his object is, by that writ, to retain the possession of a moiety of the lands until his *debt* is completely satisfied; and no one can say, until that writ is returned, whether the *plaintiff* is not satisfied, or does not still hold the lands for the purpose of his whole debt being finally satisfied. The case in *Levinz*, 92, makes it impossible for the court to interpose and set aside this action, on motion, as for an irregularity in the proceedings. It seems, therefore, to follow of course also, that we cannot grant the second motion, namely, that the *defendant* should be discharged out of custody upon common bail; for, if the action on the judgment can be maintained at all, why has not the *plaintiff* the same right to arrest the *defendant* for that part of the debt which is unsatisfied, as he would have had for the whole, if none of it were satisfied? I cannot see any distinction. There is, at least, this reason for bringing an action upon the judgment; that the *plaintiff* cannot recover interest on his debt by an execution. Whatever hardship, therefore, there may be in the case, it does not fall within that degree of oppression which is considered as a reason for discharging the *defendant* out of custody upon common bail, where he has been arrested before. Not having arrested the *defendant* before, the *plaintiff* is entitled, now, to hold him to bail.

ROOKE J. (the other judges were absent) assented.

The court added, that though it was a very proper question to bring before the court, yet, it being moved for irregularity,

THE RULE MUST BE DISCHARGED, WITH COSTS.

SMITH *against* M'CLURE.—Nov. 16.

1804.

A. declares against B. the acceptor, on a bill of exchange, stating that B. upon sight thereof, accepted it, but does not state a delivery of it, by the acceptor, so accepted to the drawer or indorsee: Held, upon a special demurrer, that the acceptor is liable by the acceptance, whether he delivers it over or not, and therefore the plaintiff had judgment.

THE plaintiff declared on a bill of exchange against the defendant as one of the acceptors, the other being outlawed. The bill was payable to the order of the plaintiff. The declaration stated that the plaintiff drew his certain bill of exchange [stating it] “and the said plaintiff then and there delivered the said bill to the said defendant, Wm. M'Clure and——, which said bill of exchange the said defendant, and —— afterwards, to wit, &c. upon sight thereof, accepted according to the custom of merchants in that particular, *by reason of which said premises*, and according to the said custom, and by the law of merchants they, the said defendant and——, became liable to pay to the said plaintiff the said sum of money specified in the said bill according to the tenor and effect of the said bill; and of their said acceptance thereof,” &c. Demurrer to the declaration, “For that although it is alleged in the said declaration, that the said plaintiff delivered the said bill of exchange to the said defendant and Wm. before their acceptance thereof; yet it is not alleged, nor does it appear, that the said defendant and Wm. or either of them, ever redelivered the said bill of exchange to the plaintiff, and for that no order is stated to be made by the plaintiff.” Joinder in demurrer.

SMITH
versus
M'CLURE.

WALTON, for the defendant, M'Clure, urged that, under the form of this declaration, it did not appear but that

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the bill, though accepted by the *defendant*, might still have remained in his hands, and, in that case, he would not be liable to pay it; and that it was not a good acceptance till delivered back to the person demanding acceptance.

ESPINASSE was to have argued *à contrà*.

But, by Lord ELLENBOROUGH, C. J. "The *defendant* becomes liable by the acceptance, and not by the delivery. Whether he delivers it over or not he is still liable; and the drawer or indorsee may bring his action, and give notice to the *defendant* to produce it on the trial.

JUDGMENT FOR THE PLAINTIFF.

HEALD against JOHNSON.—Nov. 16.

In a declaration, by the indorsee against the acceptor, on a bill of exchange, it is not necessary to aver that the acceptor had notice of the indorsement.

Semble. In an action upon a bill of exchange, with money counts also, where the plaintiff has judgment in demurrer, upon the count on the bill of exchange, he cannot obtain a rule to compute principal interests and costs, without first entering a nolle prosequi on the money counts. How he must proceed in vacation upon a summons before a judge for that purpose, see the note to this case.

HEALD
versus
JOHNSON.

DECLARATION on a bill of exchange, drawn by one James Fitzmaurice on the *defendant*, payable to him the said James Fitzmaurice, or order, stating the drawing of the bill, and the acceptance thereof, and that "the said James," to whom or to whose order the pay-

1804.

HEALD
VERSUS
JOHNSON.

ment of the said sum of money, in the said bill mentioned, was to be made, after the making of the said bill, and, before the payment, to wit, on, &c. at, &c. according to the said usage and custom of merchants, indorsed the said bill of exchange; by which said indorsement he ordered the said sum of money to be paid to the said *plaintiff*, and then and there delivered the said bill of exchange, so indorsed, to the said *plaintiff*: by means whereof, and according to the said usage and custom, the said *defendant* then and there became liable to pay, &c. according to the tenor of the said bill, and of his said acceptance thereof: and being so liable, &c.

DEMURRER, "for that the said *plaintiff* hath not, in and by the said first count of the said declaration, shewn or alleged any good or sufficient consideration for the said promise of the said *defendant*, in that count mentioned; and also, for that it is not stated, nor does it appear, that the said *defendant* had any notice of the said supposed indorsement of the said bill of exchange therein mentioned; and also for that the said *plaintiff* hath not shewn any sufficient legal liability in the said *defendant*, to pay the said *plaintiff* the said sum of money in that count mentioned; and also that it is not alleged that the said *defendant* became liable, or undertook to pay the said *plaintiff* the said sum of money, according to, or by reason, or in consideration of the aforesaid indorsement thereof, &c. Joinder in demurrer.

LAWRS, in support of the demurrer, urged that it was the constant practice to state, that the *defendant* had notice of the indorsement, as in *Lilly's Entries*, 73; and that the principle upon which it became necessary, was, because the indorsee is a stranger to the original contract, and so the acceptor cannot be required to promise to pay him, until he has notice of his becoming entitled to require such a promise.

But, by Lord ELLENBOROUGH, C. J. "The defendant is the acceptor, and does he not, in terms, promise

1804.

Ex parte
DOUGLAS.

he was impressed. *Erskine* cited *Good's case*,* in which an application was made to the court to discharge a seaman, having a freehold of 26l. and a copyhold of 20l. a year; and, although the court refused the rule upon a different ground, yet *Dennison*, J. and another judge, declared on the next day, that they would not be understood, by the refusal of the motion, to declare that a freeholder could be impressed and removed from his freehold. The question, therefore, by that case was not decided."

LAWRENCE, J. "I cannot, as yet, see to what extent this position of not removing a man from his freehold may not be carried."

GROSE, J. "Have you any *dictum* of any sort whatever in the books to support such a position?"

ERSKINE acknowledged that he knew of none. But, in the acts for impressing men into the land service, the power of impressing is confined only as to such persons, as have no visible means of livelihood.

LORD ELLENBOROUGH, C. J. "In this case the party comes rather unfavourably before the court: he merely chuses to be in the merchant service, instead of that of his majesty. He is not, therefore, taken from his freehold. If he had fairly quitted the sea altogether, and without an *animus revertendi*, it would have made a very strong case, on account of his being removed from his freehold. We must not regard the amount of the value of that freehold; we must decide upon the broad ground, whether a man having *any* freehold, may or may not be impressed; and, I own, it strikes me that the one side of such a position cannot be supported to the extent to which we must carry it in this case, if we were to grant the *habeas corpus*."

THE HABEAS CORPUS REFUSED.

* *Blac. Rep.* 251.

WARD against LOWRING.

1804.

Where, upon putting off a trial, the bail had paid 2000*l.* into court, for the defendant, to abide the event of the suit, and the suit afterwards abated by the death of the defendant, they were permitted to take the money out of court; notwithstanding the plaintiff and the administrator of the defendant insisted that it should be paid over to the plaintiff or to the administrator of the defendant.

MOTION for a rule to shew cause why the sum of *two thousand pounds*, paid into the hands of the clerk of *Nisi Prius* to be invested in the purchase of exchequer bills, pursuant to an order of *Nisi Prius*, should not be paid over to *James Abel*, attorney for the *plaintiff*, and also administrator for the *defendant*, now deceased. Notice of trial had been given in the cause in *April*, 1803; at which time a rule was obtained to put off the trial, and it was ordered that the cause should be made a *remanet* till the first sittings in *Trinity* term, upon condition that the *defendant* should pay the costs of the day, and should also, on or before a certain day, pay into the hands of the clerk at *Nisi Prius* 2000*l.* to be forthwith laid out in the purchase of exchequer bills, for the benefit of the parties in the suit, and to abide the event of the cause. This money was so paid, in *May*, 1803, and in *November* following the *defendant* died. The next of kin renounced administration, and it was granted to *Abel*, the *plaintiff's* attorney, he being a creditor.

WARD
VERSUS
LOWRING.

ERSKINE, for the *plaintiff*, and **GILES**, for the administrator of the *defendant*, applied to have the money now paid out, the suit being ended; and **GILES**, on the behalf of the *defendant's* administrator, consented that it should be paid to the *plaintiff*. And they insisted that either the one or the other must be entitled to it, and,

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versus
LOWRING.

upon both consenting, it should be paid out to whomsoever they might appoint

GIBBS, on behalf of the bail, now shewed case; in the first instance, upon an affidavit stating that, at the time the money was so paid into court, the *defendant* was gone abroad; that he had known very little of the transaction, it being upon a bill of exchange drawn by his partner; that the bail applied to put off the trial, in expectation of his returning, and that the money was actually paid into court by them for their own indemnity.

LORD ELLENBOROUGH, C. J. at first said that he doubted whether cause could ever be shewn in the first instance, where there was an affidavit on the side shewing cause. But, nevertheless, the case was permitted to be gone into. After the above statement, by GIBBS, he said, "The bail have paid this money into court, to indemnify themselves against an event which, as it now turns out, can never happen. *They* ought to have the money out of court."

GILES suggested that, although the money was paid by the bail, it was not paid by them in their character of bail, but as a loan to the *defendant*; and also that it was paid in by the bail, for them to prosecute the defence to the action, and to answer for such further costs as might be incurred by permitting them to do so.—ERSKINE said that, if the bail had not paid the money into court, the *plaintiff* would have obtained judgment long before the suit abated by the death of the *defendant*, which was not till Nov. 1803.

LORD ELLENBOROUGH, C. J. "This is not very likely to happen again; but upon the terms of the rule, it is impossible to give you the money. On a future occasion, this event may be provided against, and if the present case had, at the time, been presented to our consideration, we might

perhaps, have framed the rule in a different manner, but as it stands we are bound by it, and the bail are now in parties who in strict law, according to the rule, are entitled to the money. They on the behalf of the *defendant* paid it into court to abide the event of the cause. That event the law has determined by the abatement of the suit; and if by the event or end of the cause it cannot be paid out to the plaintiff, then it remains in the hands of the officer, as a dry pledge for those persons who placed it there. If there was a cause in which there was any apprehension of an *affected* delay, then, there might, perhaps, be some terms imposed, that it should be paid over, not on the event of the suit, but in the event of failure to proceed within a certain time, or upon any other given conditions. But, at present, there is but this mode of doing justice."

1804:
WARR
versus
Lowmire

ERSKINE took nothing by his motion, and, afterwards, GIBBS obtained a rule to shew cause why it should not be paid to *Burford and another*, the bail. ERSKINE and GILES thereupon (28th Nov. 1804.) shewed cause, and insisted that the money being once paid into court, whether by the bail or not, the court would not permit them to separate themselves from the *defendant*, in order to take the money out again, and retract their engagement. They also produced an affidavit, by *Abel* the attorney for the defendant, "that it was paid in by the house of *Peter Burford*, *Peter Burford the younger*, and *John Burford*, as the agents of the *defendant*, and not by the two *Burfords* as bail merely. That, thereupon, the said *defendant* was debited with the said sum of 2000l. in his account, and, that, in an affidavit, made in a suit in the court of Exchequer, *Peter Burford* swore, that they, the *Burfords*, had paid the money in the character of agents to the said *defendant*." They prayed, therefore, that the money might be inpounded, in order to try an issue whether *Lowring* was truly indebted to the plaintiff. They also said that it stood upon the strict ground of law, and the

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Ward
versus
Lowring.

defendant's administrator was entitled to it; for it was not paid into court by the bail, who applied for it, but by three persons forming the house of trade of *Burford and Sons*, and was as a loan to the defendant.

Lord ELLENBOROUGH, C. J. "If he were living, we would not suffer the bail to take the money out, or to sever themselves from the principle. But it is not paid in merely as the *defendant's* money, but as a pledge which the bail put in for him. During his life, it is to be considered as his money; but, now that the event of the cause is determined, they who paid it, partly for their own security, are entitled to it. We have no authority to impound the money. It was paid into court to abide the event of the suit which is now determined: it was paid in by the *Burfords* the *defendant's* agents, who took upon themselves the character of bail—I admit, not all three of them, but two only, because by the rules of the court only two are required."

THE RULE ABSOLUTE, to pay the money to the *Burfords*.

PARKER against ENGLAND.—Nov. 19.

An undertaking given by an attorney to a sheriff's officer, to appear and put in bail, is void; even though given before an arrest has been made, and when it was not in the power of the officer to execute the writ.

PARKER
versus
ENGLAND.

GURNEY moved for a rule to shew cause why an attorney should not put in bail above, and accept a

declaration for the *defendant*, upon an undertaking, and pay the costs of the application.

1804.

PARKER
VERSUS
ENGLAND.

The sheriff's officer, having a warrant upon a bill of *Middlesex* against the *defendant*, went to his house, which was within the city of London; and finding that he could not arrest him there, the *defendant* sent him with a letter to his attorney, which was carried by the bailiff's servant, and the attorney's clerk wrote an undertaking for the attorney, "I undertake to put in bail."

LORD ELLENBOROUGH, C. J. "Is not this an undertaking to a sheriff's officer, and void; and is it not at any rate in consideration that he, the bailiff, will omit to do his duty?"

GURNEY suggested, that the officer had no power to arrest the *defendant* at the time, and the undertaking might therefore be held to enure to the *plaintiff*, and might so be good. That in all the former cases where an undertaking to an officer was held void, there was an actual arrest. And the party had, by this act of the attorney, been defeated of making his arrest, which he might have made at another time.

LORD ELLENBOROUGH, C. J. "There is no disposition in the court to favour the attorney; but this is an undertaking, as it appears to me, to the sheriff's officer, and we cannot encourage it."

RULE NISI REFUSED

1804.

The KING against the LORD and STEWARDS of the
MANOR OF WATER EATON.—Nov. 19.

Where a rule has been obtained for a mandamus to issue, and the mandamus is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a mandamus, but materially enlarging the terms, the court will quash the mandamus; notwithstanding, perhaps, they would have granted a rule as large if it had been applied for, upon the same affidavits; and they will not, upon motion to quash it, amend the rule, to support the mandamus. The party ought, if there is a mistake, to apply to amend his rule before the mandamus issues.

REX
versus
Lord of the
Manor, &c. of
WATER
EATON.

MARRYATT shewed cause against a rule obtained by WILSON, to shew cause why the *mandamus* directed to the *defendants* should not be quashed, the terms of it exceeding the terms of the rule by which it was granted. It appeared there was a dispute about the right of certain copyholders of the manor for lives, to have a renewal of the like number of lives upon payment of certain fines; and, it was suggested, that the lord and steward of the manor had omitted to hold a court for 16 years. The claim was for a right to renew, after the extinction of all the lives, and the rule for a *mandamus* was obtained by several of the copyholders. The terms of the rule were only that a court should be held, viz. "commanding him to hold one or more customary court or courts." The *mandamus* itself contained a suggestion of the rights of the claimants, as is usual, stating that, from time whereof, &c. the tenants, at the extinction of such lives, have been used and accustomed to be admitted, for other lives, upon payment of a certain fine;" and the mandatory part of the writ was, "that he should appoint a day or days for the holding of a court or courts, and should hold such court or courts, in order to readmit such tenants as should

be entitled to be readmitted; according to the custom of the said manor, and take such surrenders as should be made," &c. In pursuance of this writ, the steward had held a court, but rendered it wholly illusory by refusing to readmit any one, saying the tenants had no right to renewals.

1804.

 REX
 versus
 Lord of the
 Manor, &c. of
 WATER
 BATON.

LORD ELLENBOROUGH, C. J. "We cannot go into those facts."

LAWRENCE, J. "The *mandamus* should have been to have held a court and to permit your clients to put in their claims; and then you might have come with an application for another *mandamus* to be admitted."

MARRYATT then suggested that, as in this case, he could shew himself entitled to such a *mandamus* as had issued, the court might amend its rule.

LORD ELLENBOROUGH, C. J. "The court will not amend its rule in favour of persons who have the presumption to take out a rule in a certain form, and a *mandamus* very different from it."

LAWRENCE, J. said, that if any particular person came and stated his claim, the court could look into his case, but in *the King v. the Mayor of Kingston-upon-Hull*, 1 Strange, 578, which was cited by WILSON, in moving for the present rule, it is said that several distinct rights cannot be joined in one *mandamus*.

MARRYATT, observed, that, in that case, there was no suggestion of any particular constitution of the borough under which any one in particular could have a right, so that the mayor might traverse the right of each. But in this case, the right of any copyholder is upon record in the lord's own court; and although several persons in that case could not have one writ of *mandamus* to re-

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REX

versus

Lord of the

Mandor, &c. of

WATER

EATON.

store, yet the case was very different here, and it might go to the lord to perfect, by means of the homage, the rights of several. He said that the *mandamus* was framed upon a precedent in one of *Lord Onslow's* cases; but he admitted that there the rule was more extensive than in this case.

LORD ELLENBOROUGH, C. J. "The question is not now, whether the court *could* grant a rule as extensive as this *mandamus*, but whether the parties shall ingraft upon a rule terms which were not granted." His lordship had observed to WILSON; on moving for this rule, that, "If the *mandamus* extends beyond the rule much, it may be too large, but yet there may be some things which are implied as a sort of incidents to a *mandamus*."

LE BLANC, J. "If your original affidavits had been sufficient to have warranted this *mandamus*, you should have moved to amend your rule."

RULE ABSOLUTE to quash the *mandamus*.

The KING against INGS and SAUNDERSON.—Nov. 21.

Semble. Upon an indictment, for not obeying an order of two justices, under 33 Geo. III. c. 54, s. 15, commanding the defendants, as stewards and principal officers of a Friendly Society to restore A. B. as a member, it must be shewn, that, by the constitution of the society, the defendants have the power to restore him.

The KING
versus
INGS
et al.

THE defendants were indicted for not obeying an order of two magistrates for the county of Surrey, under 33 Geo. III. c. 54, s. 15, made upon them as stewards and

principal officers of a society called the *United Brothers*; by which they were ordered to reinstate one *Young*, a member of their society, who had been expelled.

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The King
versus
Ince
et al.

The indictment was tried before *RUNNINGTON*, Serj. at *Guilford*, at the last assizes for *Surrey*; who upon his report, stated "that the order was proved to have been made and served upon the *defendants*. " *Juge* said he expected it; *Sanderson* said nothing to it." *Young* was a member for four or five years, and had been expelled, three or four days before the making of the order, for not paying up his arrears. The defence stated by the counsel was, that it was not in the power of the *defendants*, as stewards, according to the rules of the society, to reinstate *Young*, and that, therefore, they could not comply with the order, in which case, their not obeying it was not a misdemeanor. He, the learned judge, stopped the *defendant's* counsel, and, being of opinion, that to make the disobedience of the order a misdemeanor, it must be wilful, and that, therefore, proof of a misdemeanor had not, in this case, been substantiated: he informed the jury, that the contempt of the order, alleged in the indictment, was a wilful contempt, and must be so proved; and therefore, in order to convict them, they must be satisfied, that, by the constitution of the society, the *defendants* had it in their power to do as the order commanded them: That, although a copy of the articles of the society had been produced, yet no part of the book was read, to shew that they, the *defendants*, had such power; that, notwithstanding, the jury returned a verdict, guilty; that he, thereupon, requested them to reconsider the case, and repeated the evidence to them; but they still persisted in returning the same verdict." He added, "I was then, and now am of opinion, that the verdict was not only against the evidence produced, but against law."

Through some accident, which the *defendant's* counsel were prepared to shew by affidavit, they were prevented from moving for a new trial within the four days;

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The King
versus
Ince
et al.

but the *defendants* now preferred moving for judgment upon themselves, and submitting to a small fine, rather than to be kept in suspense, and possibly to be imprisoned in the mean time, unless the prosecutor consented to their being at large.

BEST, Serjt. and CURWOOD, for the *defendants*, therefore now moved for judgment.

NOLAN and WETHERALL, for the prosecutor, urged that the verdict was according to the evidence, and according to law. That the lawfulness of the order could not be a question; for it must now at least upon the verdict be considered as a lawful order; that the act of parliament gives the justices a power to make an order upon any of the principal officers of the society, and amongst them names the stewards; that this order was made by a competent authority and it was not necessary to prove wilfulness in the *defendants* who disobeyed it, that being an inference of law. That, in form, this was a criminal proceeding, but in effect, it was in the nature of a civil remedy, provided by act of parliament. That the act, by directing the order to be made on the *stewards*, or other principal officers, does, *ex vi termini*, necessarily empower them to restore the party who has been expelled; otherwise, it must necessarily follow either that there is an absolute impossibility of enforcing the act, or else the whole society must be summoned, an order must be made against the whole society, and the whole society must be indicted; that, by the latter part of the statute, the order of the two justices is to be final; that this order is in the nature of a peremptory *mandamus*, to inscribe the names of the expelled members in the books of the society, which any one can do who can write, or procure others to write for him; that it is like an order of *bastardy*, under the 43 *Eliz.*

BY THE COURT. "We should be glad to know how

the stewards are to restore this member: They may be persons who have nothing to do with it. They may be appointed *stewards* merely for the purpose of collecting, or of keeping in safe custody, the money of the society. The rules of each society are inrolled at the quarter sessions, and the magistrates might have inspected them, and seen who were the persons to admit or to reinstate members. But these persons may not even have it in their power to put his name in the books; of which not they, but the secretary, might have the lawful custody. The proof of who had the power to do so was an affirmative which might lie upon the prosecutor to be proved." But they said that as the verdict was not disturbed, and there was no motion before the court, in arrest of judgment, these were not at present topics for their consideration; and the counsel must confine themselves merely to such topics as occurred in aggravation of punishment.

1804.
The KING
versus
INOX
et al.

And afterwards by

Lord ELLENBOROUGH, C. J. "As it appears that the counsel for the *defendants* was stopped in his address to the jury, by the learned judge, it does, necessarily, appear, that the case of the *defendants* was not so gone into as to satisfy the court in giving judgment. Although the party is out of time to move for a new trial, yet the court think it necessary to require one for their own satisfaction."

A NEW TRIAL GRANTED.

1804.

ANONYMOUS. (*Execution pending a Writ of Error.*)
Nov. 21.

A confession, that a writ of error is brought for delay, sworn to have been made by "a gentleman who attended the taxation of costs for the defendant's attorney on the behalf of the defendant," is not sufficient to warrant the issuing of an execution, pending a writ of error. Such a confession has never been relied upon, except when made by the defendant or his attorney.

ANONYMOUS. ON a rule to shew cause why an execution, sued out, pending a writ of error, should not be set aside for irregularity;

LAWES, for the *plaintiff*, shewed cause and produced an affidavit, stating a confession, that the writ of error was sued out merely for delay.

MARRYATT, for the *defendant*, referred to the case of *Poole v. Charnock*,* and other cases, and said, that in all of them there was an admission either from the *defendant* or some person having authority to bind him, such as the attorney himself; but that there was no case in which the like declaration by an attorney's clerk was held binding upon the *defendant*. That in this case it was only sworn "that the gentleman who attended for the *defendant's* attorney, on the behalf of the said *defendant*, at the taxation of the costs, and at the time of the serving of the allowance of the writ of error, acknowledged, &c.

Lord ELLENBOROUGH, C. J. "*Non liquet*, that he is invested with any professional character, and the mere babble of an office is not to bind the party, who cannot be supposed to give any authority to it. We have never gone beyond receiving such admissions from the party himself or his attorney."

RULE ABSOLUTE.

AFFIDAVIT OF MERITS.

1804.

An affidavit of merits may be made by the managing clerk to the defendant's attorney, who may know more of the cause than the attorney himself.

ON a former day, 16th November, on a rule to shew AFFIDAVIT of MERITS.
cause why an attachment against the sheriff, for not bringing in the body, should not be set aside upon payment of costs, &c. the application being on the behalf of the party, an affidavit of merits was produced, sworn by the managing clerk to the defendant's attorney; and the court received it. "For," said Lord ELLENBOROUGH, C. J. "such a person may happen to know more of the cause than the attorney himself, and may be better enabled to swear to it." So note the difference between this and the last case; the one being upon an affidavit, the other an unauthorized act.

KENYON against GRAYSON.—Nov. 21.

On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment. Though it may be so where the demand is of money directed to be paid to the party.

ON a rule obtained by FELL, to shew cause why an attachment should not issue against the defendant, for not performing an award; KENYON
versus
GRAYSON.

LITLEDALE objected that the demand of the execution

1804.

KENYON
VERSUS
GRAYSON.

of the deed was not made by a person having competent authority, he not being authorized by deed to make the demand.

But it appearing that the attorney swore that he did authorize the person demanding it, to demand execution of the deed, and to pay the money, the consideration for it; which affidavit was made in consequence of the request of the court in last term, when the case was ordered to stand over, to know whether the person had authority;

THE COURT now said, that it appeared the person had authority, and that the case in *Tidd's Practice*, vol. 2, p. 748, was of a demand of the payment of money, which might be very different.*

RULE ABSOLUTE; the attachment granted.

Ex parte MARY WILKINS.—Nov 26.

Where a prisoner, in order to be discharged under the Insolvent Act, 44 Geo. III. c. 108, applies to have the sum in the committitur in the marshal's book, reduced below 1500l. alleging a mistake in the original judgment or entry, the court will require the most satisfactory affidavits from the parties interested, in order to shew that it is a fair case of mistake, and that it is not an after-thought and collusion between the plaintiff and the defendant.

Ex parte
MARY
WILKINS.

LAWES moved to amend the committitur in the marshal's book, by reducing the sum for which the defendant stood charged in execution, upon the 1st January, 1804. The defendant's affidavit stated that a verdict was obtained against her, for 1600l. and a fraction, with costs in a

* An unstamped indorsement of an award is a sufficient authority. 2 Bl. Rep. 990.

cause in which she had made no defence, being then at Jersey. She applied at the Surrey sessions to be discharged under the last insolvent act, 44 Geo. III. c. 108. Mr. Jones, the marshal, said that he could not reduce the sum in his book for which she stood charged, without a rule of the court. It appeared that a mistake had been made in casting up and settling the account between the *defendant* and the *plaintiffs*; and there had been a bill of exchange for 200*l.* of the *plaintiffs*' returned, with which they had not given the *defendant* credit. The *plaintiffs* were bankrupts.

1804.

Ex parte
MARY
WILKINS.

THE COURT said, that they should require every possible satisfaction, in such a case, that the debt at the time mentioned in the act, the 1st of *January*, 1804, did not exceed the amount of 1500*l.* That it might happen, that the parties would collude together, by means of a subsequent payment, to reduce the debt. In order to prevent this, as the conscience of the parties, in the oath to be taken, was principally bound as to the sum, they should have an affidavit from the *defendant* and the *plaintiff* as to the actual sum, and, if possible, from the assignees, which would be more satisfactory. The court wished to see whether it was a fair case of mistake.

WARD against MALLENDER.—Nov. 26.

Where, in trespass to lands, a verdict was taken for 10*l.* subject to a reference, and the costs to abide the event; and the arbitrator awarded damages under 40*s.* and that the trespass was wilful, being after notice, and that therefore the defendant should pay the costs: held, that this was not equivalent to the certificate of a judge, and according to the legal event the plaintiff was not entitled to his costs.

1854.

WARD
VERSUS
MALLENDER.

CLARKE, N. G. moved for a rule to sew cause, why the *plaintiff* should not be at liberty to tax his costs, and enter up judgment, and have execution for the same, in an action of trespass.

The cause coming on to be tried, before GROSE, J. on the *Midland* circuit, last summer assizes, it was agreed, that it should be referred to an arbitrator; and a verdict was taken for 10l. and it was agreed, that the costs should abide the event. The arbitrator, however, awarded damages under 40s. but he awarded, also, that it was a wilful trespass, and that the *defendant* should pay the costs. Upon this ground the motion was founded; and it had been mentioned before by READER, when the COURT said that this was to substitute the award of the arbitrator in place of the certificate of a judge, which could not be done. CLARKE now urged, that before the statute 22 and 23 Car. II. c. 9, the *plaintiff*, under the statute of *Gloucester*, would have been entitled to his costs. That this case did not fall within the statute 22 and 23 Car. II. c. 9, which exempts the *defendant* from costs, where the damages are under 40s. unless the judge shall certify that it is a wilful trespass. For it enacts that where the judge at the trial shall not certify, on the back of the record, that the trespass was wilful, and the jury shall find a verdict under 40s. damages, then the *plaintiff* shall not have costs; but this presupposes a trial to be had and a verdict of a jury; whereas, in this case, there was no trial, and it does not, therefore, fall within that statute, but stands as upon the statute of *Gloucester*.

LAWRENCE, J. "But how will it appear upon the record? There will appear that there is an action of trespass, there will be a verdict entered up for less than 40s. damages, and there will not be any certificate of a judge, to entitle the *plaintiff* to his costs under the statute 22 and 23 Car. II."

Lord ELLENBOROUGH, C. J. "It is to be regretted that in the rule for the reference this was not provided for.

There is an authority, *Swinglehurst v. Altham*, 3 Term Reports, 138, that the arbitrator is not placed exactly in the same situation as a judge at *Nisi Prius*, with respect to this statute, and that the award of the one is not equivalent to the certificate of the other. The costs are, in this case, to abide the event, and that event, according to the case of *Swinglehurst v. Altham*, is the legal event; we are, therefore, bound down, by the terms of the reference, and by that authority, to say that the plaintiff is not entitled to costs."

1804.

WARD
versus
MALLINDER.

LAWRENCE, J. on the former day, said, "Is this reference any thing more than substituting the award of the arbitrator instead of a verdict of a jury? But you want to have this substitute for the verdict of a jury, to stand instead of a certificate of a judge. If it had been found by a special verdict, that the trespass had been wilful, would that have entitled the plaintiff to costs without a certificate?"

RULE NISI REFUSED.



HOWELL and another against STRATTON and another.—
Nov. 26.

One may agree not to insist upon a scire facias, to revive a judgment against him after the year has elapsed, and execution sued out without a scire facias will then be good.

Where one gives a counter-security to another, containing a covenant to pay an annuity and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed, that, in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specified.
Nº. 25.

scully, being the price of the annuity, it is not necessary to assign breaches under the statute 8 and 9 W. III. c. 11. s. 8. but execution may issue for the whole sum.

1804.

HOWELL
et. al.
versus
STRATTON
et. al.

ON a rule obtained by ANDREWS to shew cause, why the execution in this case should not be set aside for irregularity, and why the sheriffs of *Middlesex* and *Surrey* should not pay over into the hands of the assignees, under a commission of bankruptcy against the *defendants*, all monies arising or to arise from such execution :

GARROW and GIBBS, for the *plaintiffs*, shewed cause, and stated that several objections were to be made ; first, that a certain indenture made the 26th day of *April*, 1800, between the *defendants* of the first part, *John Stratton* and *T. Stratton* of the second part, and the *plaintiff* of the third part, had not been enrolled under the annuity act, 17 *Geo. III. c. 20*, as one of the deeds for securing an annuity of 250*l.* granted by the *defendants* to one *Wigan* ; but this objection was not now open to the *defendants*, because it had not been stated in moving for the rule, as is required by the late rule of court. That, however, it was not material to take this objection to a point of form, because the deed itself had nothing to do with the securing of the annuity ; it was only a counter-security taken by the *defendants* themselves, and *J. and T. Stratton* were joint sureties for the due payment of the annuity, and the deed was subsequent to the annuity transaction. That there was another objection, namely, that the judgment had been entered up more than a year, and the execution had been issued without reviving it by *scire facias*. In answer to this, the above deed which contains the defeasance, recites, that two several judgments were to be immediately entered up against the *defendants*, at the suits of *John* and *Thomas Stratton* and the *plaintiffs*, respectively, for 4050*l.* to stand as counter-securities to them, *John* and *T. Stratton* and the *plaintiffs*, to indemnify them respectively, against a

1804.

HOWELL
et al.
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bond and indenture entered into by them, for the securing of the said annuity. And it was agreed thereby, that "no execution should issue upon the said judgments, until default should be made by them the said *defendants* in payment of the said annuity, in manner therein mentioned, or they the said *John* and *Thomas Stratton* or the said *plaintiffs* should be obliged or called upon to pay the same, and, that, when default should be so made by the said *defendants*, or they the said *J. and T. Stratton* or the said *plaintiffs*, should be so called upon to pay the same, by reason of their entering into such securities as aforesaid; then and in such case, it should be lawful for the said *J. and T. Stratton* or the *plaintiffs* to sue out execution upon the said judgments, for the whole of the said 2050l. and all costs, charges, and expenses occasioned thereby. And that it should not be necessary for the said *John Stratton* and *Thomas Stratton*, or the said *plaintiffs*, to revive by writs of *scire facias*, or otherwise, the said judgments, or to do any other thing to keep the same respectively on foot: although the said judgments should not have (meaning should have) been entered up of record for the space of one year or upwards. And that they, the *defendants* should not nor would have or take, or attempt in any way to have or take any advantage of the want of reviving such judgments. And that, if they should attempt so to do, by motion or otherwise, then the said agreement should be pleaded, or given in evidence, in bar thereto, any rule or practice of the courts to the contrary notwithstanding. And the said *defendants* thereby covenanted with the said parties that they would well and truly pay the said annuity.

LORD ELLENBOROUGH, C. J. "A *scire facias* is merely for the benefit of him whose person or goods are to be taken in execution; and he may agree to take short notice, or to dispense with notice altogether."

ERSKINE, LAWES, and ANDREWS were for the as-

1804.

HOWELL
et al.
versus
STANTON
et al.

signees of the *defendants*, for whom the application was made, the *defendants* being bankrupts and the execution having been levied previous to the bankruptcy.

ERSKINE admitted that the objection, as to the want of registry, was unavailable, and that registry was indeed not necessary, but upon going into other topics, upon the judgments,

Lord ELLENBOROUGH, C. J. and LAWRENCE, J. said, that the question now was only as to the irregularity of the execution; that this rule did not attack the judgment but only the execution.

LAWES then contended that the execution was irregular; first, for want of a *sci. fa.* and secondly, for want of assigning breaches under the statute 8 and 9 W. III. c. 11,* the judgment being for a penalty. *As to the first point*, he said, that no case had been stated, to shew that an agreement not to insist upon a *scire facias* was legal. That in *Thompson v. Charnock*,† it was held that, notwithstanding a covenant, that all disputes between the parties should be referred to arbitration, yet this court would not be ousted of its jurisdiction; and so, here, the writ of *scire facias* being introduced not only for the satisfaction of the court, but to protect the rights of third parties as in this case where the *defendants* had become bankrupts, it could not be renounced by such an agreement; which tended to introduce great laxity and irregularity in the proceedings of the court. *On the second point*, he said that this was a judgment in debt for a penalty: and whether that penalty, is *conditioned* in the same instru-

* In all actions upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the *plaintiff* may assign as many breaches as he shall think fit, &c.

† 8 Term Rep. 139.

ment upon which the judgment is entered up, or in another instrument, is immaterial. That the *defendant*, at the same time that he took the warrant of attorney with the above defeasance, also took a covenant to pay the annuity regularly, upon which a breach might have been assigned, and that the damages would have been 78l. for the arrears of the annuity. He referred to the deed of the 26th of April, 1800, in the clauses set out above, to shew that breaches might and ought to have been assigned.

1804.
HOWELL
et al.
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LORD ELLENBOROUGH, C. J. "On this point, as to the assigning of breaches under the statute 8 and 9 W. III. c. 11, we ought to hear the other side. As to the *scire facias*, the *defendants* have renounced it."

GARROW and GIBBS then pointed out to the court the material parts of the deed as above; making it appear, that the judgment was not for a penalty, but for a stipulated sum. That it was, in effect, an agreement taken by the surety, that, when the first default should be made in payment of the annuity, he should be put in possession of a fund sufficient to indemnify himself against all future defaults. That in this respect it somewhat resembled *Toussaint v. Martinant*,* that it was not a judgment within the statute, but upon a *mutuatus*. And the court was of that opinion, and that it was unnecessary to assign breaches.† It was suggested that it might be proper to pay the money into the bank to answer the future payments of the annuity. GARROW said that the *plaintiffs* meant to pay off the annuity; ERSKINE suggested that the assignees should have the money for the purpose of their security, but that there was no objection to this court now doing what a court of equity would probably do for the *defendants*.

The court, however, held that they could not do more

* 1 Doug. 198, n.

1804.

HOWELL
et al.
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et al.

than discharge the rule, the *defendants* not being entitled to make it absolute in either of its terms; and did not intimate what relief a court of equity could give, if any, to the *defendants* or their assignees.

THE RULE WAS THEREFORE DISCHARGED, with costs, to be paid by the assignees of the *defendants*.

EX PARTE ABRAHAM ERGAS.—Nov. 26.

EX PARTE J. EVANS and Others.

A prisoner, who was in the actual custody of the keeper of a certain prison, on the 1st day of Jan. 1804, and has since been removed into the custody of the keeper of another prison, is not entitled to the benefit of the insolvent act of the 44 Geo. III. c. 108.

Ex parte
ABRAHAM
ERGAS.
Ex parte
J. EVANS
and Others.

ON a rule to shew cause why a *mandamus* should not issue to the keeper of *Newgate*, directing him to make out and deliver to the justices, at the next general or quarter sessions for *London*, a supplemental list of the prisoners in his custody, containing therein the name of *A. Ergas*, and to take the oath with respect to him to the effect prescribed in the act 44 Geo. III. c. 108, in order to his obtaining his discharge under the late insolvent act, 44 Geo. III. c. 108: It appeared that the prisoner had, previous to and on the 1st day of Jan. 1804, been a prisoner, in the custody of the warden of the *Fleet*. That, in Easter Term last, he was removed thence into the custody of the marshall of this court, on an indictment and conviction for a libel, whence he had been committed by this court, under a sentence of imprisonment, to the gaoler or keeper of *Newgate*, who in the list returned by him, under the late insolvent act,

had omitted to insert his name; and he was thereby prevented from taking the benefit thereof.

1804.

Ex parte
ABRAHAM
ERGAN-
Ex parte
J. EVANS
and Others.

GIBBS and DAMPIER now shewed cause, and insisted, that he did not fall within the description of persons mentioned in the first clause of the act, whereby it is enacted that "every gaoler of any prison within this kingdom shall make a true, exact, and perfect list, alphabetically; of the names of all persons who were on the 1st day of *January*, 1804, and have since continued to be, and at the time of the passing of this act, and also at the time of making out such list, shall be really an actual prisoner, in the custody of any keeper or gaoler of any of the aforesaid prisons respectively, upon any process whatsoever, for any debt, damages, costs, sums of money, or contempt for nonpayment of money, and an account of the time when such prisoners are respectively charged in execution," &c. That in the second section of the act, an oath is prescribed to be taken by the gaoler, "that all persons, whose names are in the list were to the best of my knowledge and belief, upon the 1st of *Jan.* 1804, really and truly prisoners, in actual custody, in the prison of — [insert the name of the prison] at the suits of the several persons therein respectively mentioned," "and to the best of my knowledge and belief, have ever since continued to be, and, at the time of the delivery of the list, now are really and truly prisoners in actual custody." Whence it appears, that the prisoner, to be entitled to the benefit of the act, must have been in the actual custody of the gaoler, on the 1st of *Jan.* and have continued in the same custody, till the day of being brought up to be discharged. In the 26th section, however, it seems as if the case of a prisoner, being in the custody of a gaoler of one prison on the 1st of *Jan.* and of another prison subsequently, had occurred to the legislature. In that clause, the gaoler is required to take an oath, that "A. B. was really and truly a prisoner in my custody in the prison of — [or in custody in some other prison as the

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Ex parte
ABRAHAM
EROS.
Ex parte
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case may be.]" But that is an oath to be taken, "if required by any creditor of such prisoner who shall oppose his discharge." And the 28th section, which inflicts a penalty on the gaoler for making a false return, enacts "that if any keeper shall neglect to insert in any such list the name of such prisoner, who was actually in custody in his prison, on the said 1st day of Jan. 1804, &c. "he shall forfeit to such prisoner 100l." This court therefore, has no power to grant the rule. If the rule is granted and an order made by the sessions, it will be no justification to the gaoler, in an action for an escape. For, although, in the 12th section, it is enacted, that "every such order, [of sessions] whether duly made or not, shall be a sufficient discharge to the sheriff or gaoler," yet that applies only to a defect in the formality of the order, or of the local jurisdiction of the justices; whereas, in this case, there would be a total defect of jurisdiction *in rem* and the whole would be void.

ANDREWS, in support of the rule, contended, that it was not the intention of the legislature to deprive a prisoner of the benefit of the act, merely on account of the change of the custody in which he was confined, subsequent to the 1st of Jan. 1804. That the 1st sect. of the act must be coupled with and construed by the 26th section by which the then gaoler is required to inspect the books of the late gaoler, and is to take an oath, that it appears by such books that the prisoner was really and truly "in actual custody of ——— the then keeper or gaoler of the said prison or gaol [*another prison or prisons as the case may be* ;]" from which this case will appear to be within the meaning of the act of parliament. That the rule for the *mandamus* was to the keeper, to take the oath prescribed by the act, which he might safely do, because, though certain terms are specified for the oath in the act of parliament, yet it is directed to be taken "only to the effect following," and not in the precise words of the act.

LORD ELLENBOROUGH, C. J. "To the effect following" only applies to the terms of the oath, as set forth, with a reservation as to the filling up of the blanks; but it does not give any power to insert new terms in the act of parliament. In the 26th clause, still the words are "in my custody, in the prison of ——— [or in custody in some other prison, as the case may be,] on the 1st of Jan. 1804, and hath since continued to be a prisoner in my prison, [or in custody in some other prison, as the case may be;]" so that, I fear, that clause does not assist your construction; but yet, as they are to fill up the blanks, the sense seems to require that the words "in my custody" should be taken out, and it will, then, stand; "A. B. was a prisoner [in custody in some other prison, as the case may be.] In general, in these forms we are only left to fill up the blanks, but the question will be, here, whether we must not go a little further back, and insert the name of the other prison in place of the words in my custody."

1804.

Ex parte
ABRAHAM
EROS
Ex parte
J. EVANS
and Others.

Here it was suggested, by GIBBS, that the prisoner was confined under a sentence of this court for a libel, and also, was charged in execution for damages, in an action for the same libel; and therefore was excluded under the 39th section of this act, from taking the benefit of it.* ANDREWS argued, that this was a matter for the consideration of the justices at the sessions, and not for this court; and that on the 1st day of January 1804, he was not confined for that cause, for the defendant was not charged in execution thereupon until Easter Term last.

* This section provides, "that no person, who shall be charged in execution for damages recovered in any action for criminal conversation with the wife of the plaintiff in such action, or in any action for a malicious prosecution, or for any other malicious injury, shall have any benefit under this act."

1804.

Ex parte
 ABRAHAM
 ERGAS
Ex parte
 J. EVANS
 and Others.

LORD ELLENBOROUGH, C. J. "At the time when he comes up to claim the benefit of the act, he does appear to be a person charged in execution for damages in an action for a malicious injury, and, in that case, as we see that he cannot take the benefit of the act, we will not take the first step to enable him to apply for it, which would be wholly nugatory."

The rule, in this case, was therefore refused ; but the court immediately called upon

MARRYAT, who had obtained a similar rule, to support his rule in the case of *John Evans* and others prisoners in the custody of the marshal. He also argued upon the effect of the 26th clause, and said, that in that clause the oath prescribed is "I. A. B. do swear that I have examined the commitments or books kept of or concerning the commitments of prisoners to the prison of ———" [which therefore is not confined to the prison for which the deponent is gaoler,] "and I do verily believe that the said commitments are really true, &c. and by them it doth appear that ——— was on the ——— day of ——— and hath since continued to be really and truly a prisoner in the actual custody of ——— the then keeper of the said prison or gaol [*or other prison or prisons as the case may be.*]* And, therefore, it would be a good return to this *mandamus* if the *gaoler* were to say, that he had examined the books of the gaol in which the prisoners are stated to have been on the 1st day of *January* 1804, it did not appear they were so in custody at that time."

LORD ELLENBOROUGH, C. J. "Suppose he returned that they were not really and truly prisoners in custody in his prison on the 1st of *Jan.* 1804, and that he could not swear that they were so, would not that be a good return? However, as this is a question of considerable importance,

* This oath is prescribed only, "If the person delivering in such list was not gaoler on the 1st of *January*, 1804."

it is necessary we should confer with the rest of the judges. Otherwise, if we make an order, it may happen that an action may be brought for an escape, in another court, where they may have a different opinion as to our power to grant the *mandamus*."

1802.

Es pord.
ABRAHAM
EROS?
In perle
J. EVANS
and Others.

MARRYAT then suggested, that as the application to discharge the prisoner must be made at the second sessions after the act, for which purpose the court had adjourned over to the 5th of *December*, it would be necessary that the opinion of this court should be had immediately. His lordship said that the court had taken that into consideration, and would take care to prevent any inconvenience. And, as I have since understood, the judges have given their opinion that the prisoners are not entitled to the benefit of the act; it is probable therefore that the legislature will be applied to in behalf of persons situated as these prisoners were; whose case, it is presumed, was omitted by mere accident.

ALDRIDGE against SCHRADER and TOMKINS.

Nov. 20 and 23.

In a cause removed by H. Cor. from the mayor's court, bail having been put in, the plaintiff served a rule for better bail, wrongly entitled *A. v. B.* instead of *A. v. B. and C.* The defendant thereupon gave notice of justification of the same bail, and afterwards that he should add one and justify: Held, this was a waiver of the irregularity, for it is not usual to give notice of justification without an exception, though it may be done, and therefore, the notice of justification refers to and adopts the rule for better bail.

UPON a rule to shew cause why the writ of *procedendo* issued in this cause, should not be set aside for irre-

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 ALDRIDGE
 VERSUS
 SCHRADER
 et al.

gularity, with costs, and that, in the mean time, proceedings be stayed : It appeared that the cause had been removed from the mayor's court in *London* by *Habeas Corpus*. The *plaintiff*, on the 26th of *September*, took out an order, at Mr. J. LE BLANC's chambers, entitled *Aldridge v. Schrader and Another*, " that the *defendants* do, within four days next after notice of this rule, put in better bail," &c.* The *defendant* thereupon (21st *September*) under the same proper title of *Aldridge v. Schrader and Another*, served summons and order for time to put in bail upon the said writ of *Habeas Corpus*, there being no judge then in town, and on the 2d of *October* an order was had for a week's time. On the 9th of *October*, the *defendants* gave notice that bail above had been put in and on the 29th, the *plaintiff* served a rule, obtained Lord ELLENBOROUGH's chambers, that " the *defendants* do put in better bail." This order was entitled *Aldridge v. Schrader*. On the 31st of *October*, the *defendants* gave notice, that the same bail would justify, and on the 1st of *November*, a countermand thereof was served, and was waived. On the same day, the *defendants* gave notice of adding and justifying. The *defendants'* attorney stated in his affidavit, " that he had never been directed served with any rule or order of any judge of this honourable court to put in better bail in this cause," meaning that the rule was not duly entitled. The *plaintiff* sued out a writ of *procedendo* for want of a justification of bail : whereupon, the *defendants* obtained the above order to shew cause.

MARRYAT and ERSKINE shewed cause, and urged that the order of the 29th of *October* (Lord ELLENBOROUGH's order) was not defective in any material point.

* This is of the same effect in proceeding in a cause removed by *Ha. Cor.* as exception to bail in other causes. It should regularly have been a rule or order to put in bail.

Though it was not entitled with the names of all the parties, yet it was not necessary so to entitle an order at chambers. The strict rule concerning the entitling of proceedings applies only to such as are founded on affidavit.* At least, they said the *defendants* waived the irregularity by acting upon that order, by giving notice of justification, which they need not have done if they had considered it as they now do, a mere nullity. That *Bishop*, the attorney for the *defendant*, was one of the bail below, and that he could not regularly become bail.

1804.

ALDRIDGE
GETTIS
SCHRAEDER
et al.

GARROW and WIGLEY, *contra*. "This order of the 29th of *October* is a mere nullity; there has, therefore, been no call upon the *defendant* to justify bail; there has been no exception, and, therefore, the bail-piece was duly filed, the twenty-eight days having elapsed within which the exception ought to have been given."

LE BLANC, J. "If there was no order for better bail, was it necessary to give notice of justification?"

GARROW. "Notice was given to add one and to justify. The *defendants* did not act upon the last order, but upon the first, which was properly entitled, but which yet was wrong, as that ought to have been an order to put in bail only."

* But see *White v. Jones*, 5 *East's Rep.* 292, which was now referred to by Lord ELLENBOROUGH, C. J. In that case, which was an action of escape against the marshal of the *King's Bench*, *S. Mendal* and *J. O.* were in the custody of the marshal in a joint action, at the suit of the plaintiff *White*. *Mendal* justified bail in an action entitled, by mistake, *White v. Mendal* only, and a rule so entitled, allowing the justification, was served upon the marshal; whereupon, he discharged the *defendant Mendal* out of custody: And the court held, on *demurrer*, that the rule was a nullity, although there was no other action between *White* and *Mendal*, and held therefore that the marshal was liable in escape.

1864.

ALDRIDGE
versus
SCHWABER
et al.

LAWRENCE, J. "If you meant to do that, to act upon that order, you ought to have justified the bail under Mr. Justice Le Blanc's order, the order to put in bail, and to have given notice of justification, when the bail were put in, without waiting for the exception."

WIGLEY. "That order was also a mere nullity, for it should have been to put in bail only. But where a party wishes to change the bail, he must give notice of justifying, and pray that an *exoneretur* may be entered, as to the bail put in before; so that the notice of justification was no acknowledgment of the validity of the last order. The *plaintiff* is entitled to take the *procedendo*, only, in case he has properly called upon Bishop to perfect his bail. No exception was entered in this cause: the order for better bail was a mere nullity, an order not in the cause."

Lord ELLENBOROUGH, C. J. "Although no rule had been given, you must have given notice of putting in bail; but without any exception to the bail, would you give notice to justify? Now in any case where I find a man doing a thing which is in one view of the case unnecessary, shall I suppose that he considers himself as doing an act which is wholly necessary, or as advertising to a call upon him by mistake? In that way, the *defendant* gave effect both to Mr. Justice Le Blanc's order *nunc pro tunc* and to mine. By the notice of justification, he must be understood as saying, he would give effect to that other informal order, which has my name to it. In plain sense, it was an answer by him to a call made upon him, and not a voluntary act without regard to the order. Having, therefore, adopted the orders the *defendants* have cured the imperfections in them both as to the one and the other."

GROSE, J. Of the same opinion,

LAWRENCE, J. and LE BLANC, J. wished that the practice should be stated by the master, whether in

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et al.

case the last order had been wholly out of the case, taking it either to have been given or not given, it is the practice to give notice of justification? Or, whether it is only necessary, where an order to put in better bail, in the nature of an exception to bail is given? That it should be stated, whether it is usual to do as the *defendant* has done, and not merely whether it may not be done; for if it is usual to do so, only in case of an order or call made upon him, then the *defendants* have waived the regularity.

Lord ELLENBOROUGH, C. J. "If these are usual and necessary notices in this case, without an exception to the bail, then they do not refer to the order, if they are not usual and necessary without an order for better bail, then they refer to it."

Accordingly afterwards, Nov. 23, the MASTER reported on the civil side, that he was of opinion that the party had waived the regularity.

RULE DISCHARGED WITH COSTS.

HAY and another (Executors of Patrick Duff) against
GOLDSMID and another.—Nov. 26.

Where one gives a power of attorney to another, to demand and receive all monies due to him, on any account whatsoever; and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions, and to revoke the same, "and to do all other business," the latter words must be understood, with reference to the former, as meaning all business appertaining thereto, and although the attorney may receive monies due, in *auter droit*, to the principal, yet he cannot indorse a bill, for him, which comes to his hands under the power.

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IN trover for two bills of exchange, against the indorsees, tried before Lord ELLENBOROUGH, C. J. in London at the sittings after last Trinity term. The case was as follows:—Major-general *Patrick Duff*, the testator, was executor of one Captain *Patrick Robinson*. Being on service in the *East Indies*, he appointed his brothers, *James Duff* and *Robert Duff*, who were merchants in *London*, his agents, under a power of attorney. Upon his return to *England*, he executed a new power of attorney to them, appointing them, *James and Robert Duff*, “his true and lawful attornies, for him and in his name, to ask, demand, sue for, and receive of and from the Honourable the East India Company, or of and from the treasurer and paymaster of the said company, or any other person all money or sums of money due or to become due to him on any account whatsoever; and for non-payment thereof to take and use all lawful means for the recovery thereof, (pursuing the usual words of such powers,) and to transact all business.” After having executed this power, *General Duff* went to *Scotland*, and the *Duffs* acted under it, in his absence. A bill was, in the mean time, received by them from *India*, drawn by the governor and council at *Bengal*; “548 days after the 28th day of *December* ———, the second and third not being paid, pay this our first of exchange to Major-general *Duff*, executor of the will of *Patrick Robinson*.” This bill was duly accepted, and was indorsed by *Robert Duff*, for *Robert and James Duff*, by procuration for Major-general *Duff*. The bill was indorsed in 1801. The matter rested till 1802, and on the second day of *Jaquary* a commission of bankruptcy issued against *James and Robert Duff*. Major-general *Duff*, then came from *Scotland*, and disavowed the indorsement, saying, that he meant by the power to enable them to receive only monies due to him in his own right.” At the trial, it was contended that this power of attorney, though a general authority to receive all monies, on all accounts, and including therefore monies due to General

Duff, in *enter droit*, yet did not empower *James and Robert Duff* to indorse bills, and to make *General Duff* liable, for the amount of them, to third persons. Lord ELLENBOROUGH, C. J. being of that opinion, a verdict was given for the *plaintiffs* in the amount of the bills, with liberty for the *defendant* to move for a nonsuit to be entered.

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A rule to shew cause having been obtained, GIBBS, WILSON, and JERVIS, argued, shortly, for the *plaintiffs*, and contended, that the authority was to be construed strictly, and that the *Duffs* had exceeded it, and admitted that they might have received the money, but said that they could not indorse the bill.

Lord ELLENBOROUGH, C. J. "Do you not remember a case before Lord KENYON (I presume at *nisi prius*) in which there was a dissolution of partnership, and a covenant to permit one to receive all monies due, and he held, that the party could not indorse a bill upon a receipt of money due to the partnership, though he might have given a discharge to the *defendant*."

ERSKINE and GASELEE, for the *defendants*, relied upon the extensive words of the power, "to transact all business," which must include every thing; and they argued, that, if the power was only to receive money, these latter words would be nugatory, since, in fact, then there could be no other business to do."

Lord ELLENBOROUGH, C. J. "It comes merely to the question, whether this is to be construed as a general power to do all business whatsoever, for *General Duff*, or whether it is not to be understood with reference to the preceding subject matter of the power; and when any one substitutes other persons to act for him, the largest words are to be construed with reference to the subject matter. It must be understood, as if he said, I give a power of

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attorney to act for me in these terms, mentioning the power to receive the money, and "to transact all business," incident and appertaining to that business for which he is appointed, namely to the receiving of money. And, this clause may be necessary, to empower them to receive a composition, or to give delay of payment. But without saying what it authorizes them to do, in particular, it only authorises them to do something in the nature of or relating to the payment and receipt of monies. In this case, if extended as far as is insisted by the counsel for the *defendant*, it would authorize them to make General Duff liable for the bill. But notwithstanding, that under the authority to receive money, the Duffs would have received the money for this bill, and have made themselves liable to General Duff, and, by means of their bankruptcy, the money would in the event have been lost to him, yet that will not authorize us to extend the words of the power.

GROSE, J. of the same opinion.

LAWRENCE, J. observed, that it could not extend to all business whatsoever, for in that case, it might give them a power to let lands and to turn the tenants out, upon notice. That the words *to do all business*, and *to do ratify and confirm all that they shall do in the premises*, which are all large and comprehensive words, follow immediately upon the power to sue and "to appoint attorneys for that purpose, and to revoke such appointment," which must therefore, confine them to the appointing of attorneys, in actions to be brought in his name."

LE BLANC, J. concurred, and stated similar grounds for his opinion, saying that the absurdity which must follow from extending the power beyond the previous terms, must make it sufficiently clear, that "to do all business," must be confined, only, to those sorts of bu-

business, which are immediately connected with the subject-matter of the power,

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RIGHT on the Demise of WM. FISHER and Others
against CUTHELL.—Nov. 26.

Under a proviso to determine a lease upon notice in writing, two out of three joint-tenants in fee, trustees and executors of the lessor, gave notice, under their hands, to determine the tenancy, the third being out of this country: held, that this notice was insufficient, there being no proof of the assent of the third trustee, previous to the notice, and his assent afterwards cannot be presumed, and it seems, is not sufficient, for, as the tenant is to act upon this notice, it ought not to depend upon any act of another, subsequent to its being given.

EJECTMENT, to recover twenty messuages in St. Botolph, Aldgate, on the demises of Wm. Fisher, Samuel Nash, and James Hyrons, otherwise Hyron; a second demise by W. Fisher and S. Nash jointly, and other demises by all three separately. The lessors of the plaintiff claimed as co-executors and joint devisees under the will of one Moses Adams; and the defendant claimed as assignee of a lease of the premises bearing date Oct. 20, 1789, made between the said M. Adams and one W. Cuthell, the defendant's testator, whereby the said Adams demised the same to the said Cuthell, to hold to the said Cuthell, his executors, &c. from Michaelmas-day then last, for 21 years, at the yearly rent of 81l. &c. In which lease, there was a proviso for either the lessor or lessee, their or his heirs, executors, administrators, or assigns, to determine the said term, at the expiration of the first seven

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or fourteen years of the said term of 21 years, on giving to the other six months previous notice in writing.*

At the trial before Lord ELLENBOROUGH, Ch. J. at Westminster, the plaintiff proved the will of *Moses Adams*, dated Nov. 20, 1799, whereby he devised unto *Wm. Fisher*, *James Hyron*, and *Samuel Nash*, and to the survivors of them, and to the heirs and assigns of such survivor the premises in question, *inter alia*, being freehold, upon trust, that they the said executors and trustees, or the survivors of them, or the heirs and assigns of such survivor, should at any time, not exceeding two years after his decease, absolutely sell the same by public auction, and should stand possessed of the money arising therefrom for the benefit of his the testator's seven children; and he appointed them his executors. The period of 14 years, for determining the said term, expired at Michaelmas-day, 1803, and notice for that purpose was served on the defendant *Ann Cuthell*, as the widow and personal representative of the lessee, *Wm. Cuthell*.† This notice was only signed by *Fisher* and *Nash*, the other executor, *Hyrons*, being then, and for several months afterwards, at *Hamburgh*.

The only question was, whether this demise was determined by a sufficient notice from the persons who could

* This statement of the *proviso* is copied from the brief of the plaintiffs, but, throughout the argument and the judgment, it was taken as if the *proviso* contained the words *notice in writing under his or their hands respectively*, or words of the like import. This appears from Mr. *Marryat's* note of the judgment, on his brief, as well from my own notes. The court, however, as will be seen, decided upon a general principle, and not merely on the words of the *proviso*.

† This notice not being stated in the brief for the plaintiffs, I have not been able to procure a copy of it, though I have applied to both sides; but it appears from my notes of Mr. *Espinasse's* argument that it contained a copy of the devise, or at least a statement of the estate which these trustees took.

have power to determine the tenancy, it being signed only by two of the trustees, and no evidence being given of the previous assent of the others. Lord ELLENBOROUGH, C. J. was of opinion that the notice was not sufficient, and, therefore, directed a nonsuit.

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A rule having been obtained to shew cause why this nonsuit should not be set aside, and a new trial had;

GIBBS and ESPINASSE shewed cause; "The notice ought to have been given by all the executors of *Moses Adams*. Executors are not in this case as a corporation, who can act by their majority. The tenant does not know but, that the third executor, when he returns to *England*, may dissent from the notice, and then the tenant cannot be obliged to quit two-thirds, but must occupy or quit the whole. It was argued, at the trial, that every act in law of one joint-tenant shall bind the other where it is for his benefit: but it does not bind where it tends to divest him of any right, estate, or interest. This notice, however, does divest the third person of an interest which he has in the rent; and, by this notice, the two would endeavour to part with the estate which the third has in the rent. It is a matter of discretion intrusted to him as executor and trustee, and *non liquet* whether it may turn out beneficial to him or not. As it regards the tenant, it is wholly inconvenient and unjust. If it is not beneficial to the third trustee, or whether it be so or not, he may dissent, and then the notice will clearly be invalid. But, from the nature of the relative situation of landlord and tenant, the notice ought to be certain, and ought to be either valid or not, at the time of the giving of it, independently of any subsequent event. The tenant has a right to know, absolutely, whether he is to quit or not; as, in the case of lands, the rules applicable to which are applicable to all other cases, the tenant, upon the receipt of the notice, is to settle what he is to do with his farm, and how he is to manage the cultivation of it, whether he is to crop

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it or not. Uncertainty in this case is therefore a grievous injury to a tenant: In the notice, the *two* state that they act for themselves and the third, and assume, therefore, that they have authority from him; but no authority whatever was proved at the trial." The case of *Wilkinson v. Colley*,* was cited in moving for the rule, and now ~~ERSKINE~~ distinguished it from the present by shewing, that Mr. *Mytton*, who gave the notice as *agent* in that case, was appointed a receiver by the court of Chancery, and produced his authority; and he admitted that if an authority had been proved here the notice would have been good by the two as agents for the third, but the notice ought, in that case, to have stated that they acted as agents duly authorised, which would put the *plaintiff* upon proving the authority."

Lord ELLENBOROUGH, C. J. "It seems clear that the act of one joint-tenant, for the benefit of another, will bind him. But, even taking the case in that view of it, my difficulty still is, that it is not known to us whether this act is beneficial or not."

ERSKINE and MARRYAT, in support of the rule. "It is clearly for the benefit of the lessor that the tenant should quit, since the tenant deems it his interest to hold out. *Prima facie*, at least, it is beneficial to the third executor and the other side ought to shew that it is not. Under the condition in the lease, this notice is to be given by the executors or administrators, and the act of one executor is good as to all the rest."

Lord ELLENBOROUGH, C. J. "If this notice is to be given by the executors, under the condition, as to free hold land, which does not belong to them in right of their executorship, then this condition gives to them a mere power without an interest and must be executed strictly."

[ERSKINE said, they were devisees also in trust.]

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MARRYAT. "It is not necessary to inquire whether this is a freehold estate, which in fact it is, although it is not stated in the report of his lordship, but the words of the covenants are to the lessor, his *heirs*, &c. Therefore, whether under the devise or as executors, the lessors of the plaintiff take a joint and entire interest, and neither one of them could avow in *replevin* for the rent without the others."

LE BLANC, J. "The tenant is wholly ignorant of the title of these parties. The notice only states that *M. Adams* made his will, and they take as his executors."

MARRYAT. "One of several administrators may assign a term without the others joining. *Thurstons v. Coppin*.* If, therefore, it is to be considered as a mere term, the notice is good, and the tenant could not be deceived. This notice, in general terms, will refer to their title, whatever it may be. But take it in the other way, as an estate of freehold devised to them, then the common course is for mere agents to give notice, and any one of the three may give notice as agent for all. So an entry upon the lands by one who is a mere stranger, without authority, is good, if assented to afterwards by the party who is to take advantage of it." *Fitchel v. Adams*.†

LORD ELLENBOROUGH, C. J. "There no other person's act depended upon that entry."

LAWRENCE, J. "That case went upon the rule of law *ratihabitio mandato equiparatur*. But Mr. GIBBS will say it cannot apply here, because the third party may not have assented."

LORD ELLENBOROUGH, C. J. "And being joint-tenants, then, he may distrain for all."

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MARRYATT. "Then he must avow in the names of all three."*

LORD ELLENBOROUGH, C. J. "That is, if the lease is subsisting, so that it comes to the same question as before. But, in that case, if the tenant should quit the land, could not the other third person claim the rent; and how would you plead this notice in bar to an avowry?"

MARRYAT. "By stating the proviso in the lease, the notice given by the two for the three, and the tenants quitting in consequence thereof; and then it would go to the jury whether there was any consent given."

Lord ELLENBOROUGH, C. J. "But still, by this notice, there is no evidence conveyed to the person who is the object of it, that the third party does assent."

MARRYATT. "Then it comes to the other question, whether they can do an act which may be for the benefit of the third."

LAWRENCE, J. "And which shall bind the other third person who is absent."

LORD ELLENBOROUGH C. J. "The condition is, that the notice shall be given under their respective hands. This condition being annexed to the legal estate must be strictly pursued. Upon principle, too, the notice to determine the lease ought to be so certain and effectual, at the time, that the person who is to be affected by it ought to be assured absolutely of the determination of the estate by the notice; and at the same time he who is to come in afterwards should be equally assured of the com-

* One joint-tenant may distrain alone; but then he must avow in his own right and as bailiff to the other. 5 Mod. 73. 150. 3 Salk. 207.

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mencement of another estate. But, if two only join in the notice, how can the tenant act upon it with any confidence? Admitting that it may be ratified by the absent executor, yet that will not put the tenant in the same situation. It may or may not be so ratified; and then he cannot begin to cultivate his land as he would do, if, at the time of the notice, he was assured of its validity or its insufficiency. It should also appear, indisputably, that this is a beneficial act for the third executor and devisee who is absent. For two joint-tenants have clearly no power to do an act to bind another, unless it is for his benefit. Subsequent reasons may render it so or not; but it ought to be so clearly at the time. Under the terms of the condition indeed the notice is not good, because it must be under their respective hands, and the subsequent ratification is, then, not a good confirmation of it. At any rate, if the rule of law, as to the separate acts of joint-tenants, is to operate, and this, being for the benefit of the other joint-tenant shall bind, it ought to appear, as a condition precedent, on the part of those who would avail themselves of that rule, and they ought to shew, that it must necessarily operate to the benefit of the person for whom it is done. But there is nothing here to shew that the continuance of the rent may not be a more beneficial thing for the absent trustee than the repossession of the estate. There is no evidence to the contrary, and it is difficult to state any to the contrary; nor is there any evidence of any authority previously given.

GROSE, J. was of the same opinion, and observed that, by the proviso, the notice was to be given under his or their respective hand or hands.

LAWRENCE, J. also concurred, and said, " There is a great deal in what Mr. Gibbs has urged, that the notice ought to be binding at the time when it is given, and not to depend upon any subsequent ratification or disavowal; for it is a notice upon which the tenant is to act, and it is

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to regulate his future conduct. But, if it is made to depend upon what may be done afterwards, it may put him to the greatest inconvenience, for there would then be an interval of time when he could not tell whether it would be ratified by the absent party or not. It has been inferred that it may be good upon the principle of a subsequent acknowledgment and adoption by him for whom it is to operate, according to the rule *ratihabitio mandato æquiparatur*. But the cases in which that rule applies must always be those only in which the *ratihabitio* or *ratification* cannot be understood to be an injury to either of the parties, nor to put them in a different situation than they would have been in, if the *mandatum* or original and previous authority had been given."

LE BLANC, J. "I cannot say that this is under the hands of each of these persons, which seems necessary, under the condition, to determine the estate. But the stronger ground is that the party ought to have a good notice to act upon at the time.

"I am not satisfied with the answer given, that it is good, because it operates for the benefit of the third person, and that, because no dissent is proved, he must be taken to have assented. It is possible the other two might have died before the expiration of the notice. The estate must then have vested in the others solely, and if he had distrained for rent due afterwards, I do not know that the tenant could say that he had actually joined in the notice."

RULE DISCHARGED.

In the Matter of CHARLES TEMPLER, an Infant. In the Exchequer.—Nov. 27.

Where lands have been taken for the service of government, under the statute 4 Geo. III. c. 95, and an application is made to

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the court of Exchequer, to lay out the purchase-money in government securities to the uses of a certain will, that will must be produced in court, attested by one of the subscribing witnesses, on affidavit, and the court will not make an order, upon production of the probate only.

THIS was an application, on the part of an infant, by his mother and next friend, and the trustee of certain freehold estates, under the will of his late father, concerning 2000*l.* the purchase-money of the said estate, which had been paid into the hands of the deputy remembrancer, by the general officer of the district, under the statute 44 *Geo. III. c. 95*, "to amend an act to enable his majesty to provide for the security of the realm," &c. and which lands had been taken for the service of government. The party, therefore, applied to have the money laid out in 3 *per cent.* consols to answer the uses and trusts in the will of the late *Mr. Templer*.—The thirteenth clause of the act, upon which the application was founded, authorizes "the barons of the Exchequer at Westminster, &c. of the degree of the coif, in a summary way, upon motion, or by petition, and upon reading the said certificate [of the deputy-remembrancer,] and such further satisfaction as they think necessary, to pronounce such directions, for paying the said money, or any part, or for placing out such part as shall be principal, in the public funds, or upon government or real securities, and for payment of the dividends or interest, or any part, to the respective persons entitled, or for laying out the principal, or any part, in the purchase of other lands, to be conveyed to the same uses and purposes as the lands settled at the time, as near as can be done, or otherwise concerning the disposing of the said money, interest, or part thereof, for such person's benefit or for appointing any trustees, as the said court shall think just and reasonable."

In the Matter
of
CH. TEMPLER,
an Infant.

On hearing **Mr. PLUMMER**, for the infant, the court held that they could not proceed to make an order, without

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In the Matter
of
CH. TEMPLE, as Infant:

having the original will produced *in court*, with an affidavit by one of the attesting witnesses, similar to the proof of a will of lands in courts of law or equity, and that they could not proceed merely upon the office-copy or probate of the will.

RULE REFUSED.

DOE on the Demise of THOMAS STOPFORD against ROBERT STOPFORD and RICHARD SPENCER.—Nov. 27.

A. by his will, after devising to his three sons separately three leasehold estates, and to his daughter 600*l.* to be paid her at twenty-one years of age, and also after devising the residue to his three sons to be divided equally, share and share alike, at twenty-one years of age, and also after directing that the produce of his real and personal estates shall be applied towards the bringing up of his said children, till of age, further directs that, if any of his said children should die under age, and without lawful issue, the share of him or her deceased shall go equally amongst his surviving sons: held, that though the word share, in his will, has different meanings in different parts, which it is not necessary now to mention, yet here it means the whole share of each child, in the personalty, under the whole of the will, and includes also the leasehold estate before devised to one of the sons dying under age, which, therefore, is to be equally divided between the two survivors.

DOE dem.
T. STOPFORD
versus
R. STOPFORD
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EJECTMENT for the moiety of certain premises, situate in Dalton, in the county of Lancaster, upon two demises for fourteen years, one in the 23d day of April, 1799, and the other on the 25th day of March 1803. Plea, not guilty:—tried at Lancaster, 6th of April, 1804; verdict for the plaintiff, subject to the opinion of this court on the following case:

Richard Stopford being seised to him and his heirs of an estate *pur autre vie*, in the premises in question

on the day of *May* 1779, died intestate, leaving his widow *Jane*, and his only son and heir at law *John Stopford*, him surviving, who, thereupon, became, in like manner, seised of the same estate. *John Stopford*, the son, had three sons, *Richard* the eldest; *Robert*, the defendant, the second; and *Thomas*, the lessor of the plaintiff, the youngest; and one daughter, *Jane*. *John Stopford* died, so seised, in *December*, 1799, having first duly made and published his last will and testament as follows:—

“I, *John Stopford*, of *Mawdesley*, in the county of *Lancaster*, yeoman, do make and ordain this my last will and testament in manner and form following, that is to say, first, I order and direct all my just debts, funeral expences, and the probate and execution of this my will, to be paid out of my personal estate, as soon after my decease as conveniently may be, and I give, devise, and bequeath all my messuages and tenements, with the lands, hereditaments, and appurtenances thereto belonging, situate, lying, and being in *Dalton*, in the county of *Lancaster*, being leasehold under *Richard Wilbraham Bootle*, of *Latham*, in the said county, esq. and now in the occupation of *Nelson*, as farmer thereof, unto my son *Richard Stopford*, to hold the same, from and after the decease of my mother, to him, his heirs, executors, administrators, and assigns, during all the residue and remainder of my leasehold estate and interest therein; and I give, devise, and bequeath all that my messuage or dwelling-house and tenement in *Mawdesley* aforesaid, whereat I now live, and the lands, hereditaments, and appurtenances thereto belonging, being leasehold, under *Sir Robert Iltsketh*, of *Rufford*, in the said county, Bart. and also all those my closes, closures, or parcels of land or ground, commonly called the closes on *Blackmoor*, in *Mawdesley* aforesaid, which I hold by lease under the *Earl of Derby*, unto my son *Robert Stopford*; to hold the same to him, his heirs, executors, administrators and assigns, during all my several and respective estates and interests therein or thereto; provided

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always, nevertheless, and it is my will and mind, my executors herein after named, and their executors and administrators, shall hold, manage, and dispose of all and every my said messuages, tenements, closes, and parcels of ground, heretofore by me given and devised, till such time as my said sons, to whom the same are given, shall respectively attain the age of twenty-one years, and, till that time, dispose of and apply the clear yearly rents, issues, and profits thereupon arising, in manner herein after mentioned; and I give and bequeath unto *Ecan Counce*, the elder, of *Maudesley* aforesaid, yeoman, and *Ralph Culshaw*, of *Wrightington*, in the said county, schoolmaster, my executors herein after named, their executors and administrators, the sum of three hundred and forty pounds; upon trust, that they my said executors, and the survivor of them, and the executors of such survivor, do and shall put and place the same out at interest, upon the best security and for the best interest they can get, upon such security, for the same, and, out of the yearly interest therefrom arising, do and shall give and pay, into the proper hands of my beloved wife *Elizabeth*, the yearly sum or annuity of 15*l.* every year, during the term of her natural life, if she shall so long continue my chaste widow; but if she shall marry again, then I order and direct that the same annuity of 15*l.* shall, from the time of her marriage, cease, determine, and be no longer paid her; and in such case, I give and bequeath unto her the sum of 20*s.* in lieu thereof, and if the said principal sum of 340*l.* shall make more interest than 15*l.* yearly, I order and direct, that the overplus, as well as the same principal, upon my said wife's decease or marriage, whethersoever shall first happen, shall go unto and be divided amongst my said sons, *Richard Stopford* and *Robert Stopford* and my son *Thomas Stopford*, their respective executors and administrators, share and share alike; and I give and bequeath to my daughter, *Jane Stopford*, her executors and administrators, the sum of 600*l.* to be paid her as soon as she shall attain the age of twenty-one years, and all the rest, re-

idue, and remainder of my worldly effects, not herein before disposed of, I give, devise, and bequeath to my said three sons Richard, Robert, and Thomas, to be divided equally amongst them, their respective executors and administrators, share and share alike, when and as soon as they shall attain the age of twenty-one years; and I order and direct, that the profits and produce of my real and personal estates shall be applied towards the bringing up of my said children, till of age. And I hereby further order and direct, that, if any of my children die under age, and without lawful issue, the share of him or her deceased shall go equally amongst my surviving sons; and I hereby constitute and ordain the said Evan Caunce and the said Ralph Calshaw my joint executors of this my will, &c."

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Jane Stopford, the mother of the testator, John Stopford, died in July 1781, Richard Stopford, the devisee of the premises in Dalton, mentioned in the will, died in August 1785, at the age of sixteen years, intestate and without issue. From the said testator's death, until the defendant Robert Stopford; the next brother and heir at law, of Richard Stopford the devisee, came of age, the executors in the above will named, were in the receipt of the rents, issues, and profits of the said premises by the said will devised to Richard Stopford;—since which period, the defendant, Robert Stopford, first, by his own occupation, and, afterwards, by the occupation of his tenant Richard Spencer, the other defendant, has had the possession and enjoyment, of the said premises devised to Richard Stopford. The lives upon which the estate is held are still in being. This action is brought, by the lessor of the plaintiff Thomas Stopford, being the youngest son of John Stopford, the testator, who attained his age of twenty-one years, on the 22d day of April, 1799, to recover the moiety of the said leasehold estate in Dalton, to which moiety he lays claim by virtue of his father's will before mentioned.

The question is, whether, upon the construction of the

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will of *John Stopford*, the lessor of the *plaintiff* has become entitled to a moiety of the said leasehold estate.— If the court should be of opinion that he is, then the verdict is to stand; if not, then a verdict to be entered for the *defendants*.

This case having been fully argued,* the opinion of the court was now delivered to the following effect, by

Lord ELLENBOROUGH, C. J. “ The question, whether the lessor of the *plaintiff*, the younger son, is entitled to a moiety of the leasehold estate devised to *Richard*, in the event, which has happened, of *Richard's* death without issue, depends on the meaning of the word *share*. Its sense, capable of distinct and different meanings, is to be collected from the context where it occurs in other parts of the will; as particularly in one part where the overplus of the 340*l.* after raising the annuity of 15*l.* out of the interest thereof to his wife is spoken of and directed to be divided among the three sons, share and share alike.

* I did not hear the argument; I was probably engaged in the court of *Exchequer* at the time when it came on. But it is easy to collect from the judgment and the case what may be presumed to have been the course of the argument. It was probably contended, that the contingent devise over of the share of each child must be taken with reference only to the more immediately preceding clause of the devise of the residue; and the more so, because, though all the shares of the children are mentioned to go over, yet the sons only, to whom the residue was devised, are to take under it, and not the daughter. This construction must have been strengthened by the inconvenience alluded to by Lord ELLENBOROUGH, C. J. in his judgment, of dividing the leasehold estates amongst the three sons, which the testator, in the former part of his will, had kept separate. The construction in favour of the other side, and on which the judgment of the court is founded, arises upon the literal meaning of the words, “ any of my children,” and “ the share of him or her deceased,” which evidently includes the whole *share* devised to him or her, under the whole of the will.

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The word *share*, in this instance, necessarily means an equal proportion of the personal fund. In the second instance, where he speaks of the residue of his worldly effects, it has the same effect as before. In the last, which is the place in question, after having directed that the profits of his real and personal estates shall be applied towards bringing up his said children till of age, the testator orders that if any of his children die under age, without lawful issue, the share of him or her deceased, shall go equally among the surviving sons. Here the share of *her* deceased can only mean, as to the daughter, the *entire share* of 600l. which was given to the daughter; for she had no participation of what was given to the sons separately, or to the wife, or the residue of his worldly effects given to the sons immediately before. If, therefore, the word *share* can only mean, with respect to the daughter, her entire share, it is reasonable to give it the same meaning with respect to the son, unless something in the will, or some rule of law, is contravened thereby. But neither of these effects follow from giving this construction to the word *share*. It occasions, indeed, some inconvenience, which inclined me at first to be of a different opinion; that is, the necessity of dividing what is one entire term, as between the landlord and tenant, between two surviving sons; whence arises an inconvenience, with respect to payment of rent and contributions to taxes or renewals, which it appears the testator had steered clear of in the former devises. But upon consideration I do not feel that this circumstance can weigh against the other inference from the clear meaning of the word *share*. We are, therefore, of opinion, that the lessor of the *plaintiff*, the younger brother is entitled to a moiety of what was devised to *Richard*; and that the whole does not descend to the heir at law. The verdict in favour of the *plaintiff* ought therefore to stand.

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WYNNE and SCHOLEY against RAIKES and others.

Nov. 27.

A. in America drew bills of exchange on B. in London, which, upon being presented for acceptance, B. refused to accept, and some were protested. Immediately afterwards, B. wrote to A. noticing this protest, and said, "our prospect of security, on the Chesapeake is so much improved, that we shall accept or certainly pay all the bills which have hitherto appeared:" Held, this was an acceptance, notwithstanding the letter did not reach A. till after the bills were due, and could neither induce credit, nor have been communicated to third persons after the bills became due.

THE first count of the declaration, in this case stated that on the 9th day of November, 1801, *Aquila Brown* drew a bill of exchange on the defendant, for 500l. payable to the order of *Thomas Andrews* and *Butler*, at 60 days sight; that *Thomas Andrews* and *Butler* indorsed the said bill to the plaintiffs, and that the defendants, upon sight thereof, duly accepted the bill. There were also counts, in the said declaration, for money paid, laid out, and expended, and for money had and received. The defendants, pleaded the general issue, and the cause came on to be tried before LORD ELLENBOROUGH, C. J. at Guildhall, at the sittings after last Hilary term, when the Jury found a verdict for the plaintiffs, for 555l. subject to the opinion of the court on the following case. On the 9th of Nov. 1801, *Aquila Brown* who resides at *Baltimore*, in *North America*, drew the bill of exchange in question, at that place, upon the defendants, who reside in *London*, and, for a valuable consideration paid the bill to *Thomas Andrews* and *Butler*, who also reside in *Baltimore*; and the said *Thomas Andrews* and *Butler*, afterwards, for a valuable consideration, indorsed it to the plaintiffs, who also reside in *London*.

On the 19th of November, 1801, *Aquila Brown*, by letter of that date, advised the defendants of having va-

lued on them, by divers bills, amounting together to 5,548l. 14s. 2d. sterling. of which the bill in question was one : the amount of which said several bills the said *Aquila Brown*, in his said letter, requested the *defendants* to honour with acceptance, and place the amount to his debit; and which letter of advice was duly received by the *defendants*. The *plaintiffs* on receiving the bill in question, in *England*, presented it, the 2d of *January*, 1802, to the *defendants* for their acceptance, but the *defendants* refused to accept it.

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On the 13th of *January*, 1802, the *defendants* wrote a letter to *Aquila Brown*, the drawer of the bill in question, which letter, after mentioning some damage which the cargo of the *Chesapeak*, consigned to the *defendants*, had sustained, and some difficulties in which it had been involved, as also an attachment laid upon property of *Aquila Brown's* in the hands of the *defendants*, amongst other things, contains the following passages: " under these circumstances, while your property in the *Chesapeak* appeared in so very questionable a state that we could not tell what security to rest upon it, you could not expect that we could interfere for any of your bills refused by Mr. *Mangin*, or even accept all the bills of yours which came in upon us. Several of them, of course, have been noted, for non-acceptance; and Messrs. *Finlay*, *Bennalyne*, and Co. have officiously sent you a protest on that for 551l. 15s. for non-acceptance. We have, however, now the satisfaction to mention to you, that Mr. *Mangin* having resolved to pay many of your bills on him, Messrs. *McLish* and Co. have taken off the attachment in our hands; and, since the receipt of Messrs. *Muilman's* letter of the 5th instant, our prospect of security on the *Chesapeak* is so much improved, that we shall accept, or certainly pay, all the bills which have hitherto appeared; the one for 6,500l. the 19th of *October* has not yet been presented to us, but we will hope, that the state of your funds will likewise permit us to take care of that." The bill in question was one of those which had appeared prior to the writing the above

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letter of the 13th *January*, 1802, and which letter was received by *Aquila Brown*, in *America*, on the 19th *March*, 1802. On the 6th of *March*, 1802, which was 60 days, and 3 days grace after, the bill in question was presented for acceptance, the *plaintiffs* presented the bill to the *defendants* for payment; but the *defendants* refused to pay the same, and the *plaintiffs* caused it to be protested, for non payment.

Aquila Brown, the owner of the bill, was at the time the same was drawn indebted to the *defendants* in the sum of 5000*l.* and hath so continued to the present time. Question, whether the *plaintiffs* are entitled to recover? If they are, then the verdict to stand; if otherwise, a nonsuit to be entered.

LITTLEDALE, for the *plaintiffs*. "The question is, whether the letter of the *defendants* to *Aquila Brown* amounts to an acceptance. Under the late decisions it clearly does amount to an acceptance. *Johnson and Collings** and *Clarke v. Cock*,† nearly resemble this case, particularly the latter. The only difference is, that, in this case, neither the purport of the *defendant's* letter nor the letter itself were communicated to the *plaintiffs*, till after the bill became due. If this case rested on a special agreement to accept, then it would be necessary to shew that the letter was communicated to the *plaintiffs*, and that they, thereby, became a party to the agreement. But this is not merely an agreement, but is as an actual acceptance, in the strict technical meaning of the word. Now notice to the holder can only be required as evidence of his assent to it. But his assent must be implied; for, *ex vi termini*, by the acceptance, the benefit of it goes to all the persons who are, or may become, the holders of the bill. If, however, it is held necessary, that it should be communicated, before the bill becomes due, then one holder who has notice may

*1 *East's Rep.* 98.

†4 *East's Rep.* 57.

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take advantage of the acceptance, and another not; but, on the contrary, *acceptance* enures to the benefit of all. If the letter is communicated to the first payee, it will pass as an acceptance to the other holders, by indorsement; and it is sufficient if the acceptance is made to the drawer only. In the case of *Glark v. Cock*, Lord ELLENBOROUGH says, "the cases have decided that such a promise," a promise to accept [and I confine myself to the circumstances of this case] made after the bills were drawn, and communicated to third persons, who, on the credit of it, advance their money on the bills, shall operate as an acceptance." Now here *Aquila Brown*, who is the drawer of the bills, advises the *defendants* of them. They return for answer, that several bills have been noted, but they promise to *accept* or *certainly pay* the bills which have hitherto appeared, amounting to 5,548l. 14s. 2d.; and this promise they make, because they have funds coming in from a certain quarter. If the drawer had communicated this letter, that would have been an inducement to the holder to have taken the bills; but, having parted with it before, he, the drawer, could not know where the bills were; neither could the drawee; but he, the drawee, does as much to effectuate this purpose as is in his power; for he communicates it, that is, he writes the letter to the drawer, who is, as it were, the fountain-head of the bill; in order that he may communicate it to the other parties, to whose benefit, therefore, it must enure. It cannot be meant that, in order to entitle the holders to sue, it should actually be communicated to them previous to the time for payment; because it may happen, as it did in this case, that, from the course of the post, the letter containing the promise of acceptance, cannot arrive at the place of the drawer's residence, until after the day appointed for payment. In *Powel v. Monnier*,* the letter was written also to the drawer of the bill, and it does not

* 1 Atk. 611.

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appear, in that case, that it was communicated to the *plaintiffs*; and LORD HARDWICKE did not decide on that ground, but entirely upon the letter which was written on the 13th of *April*."

LORD ELLENBOROUGH, C. J. "The *plaintiff* had not taken it on the inducement of the letter, because the bill, there, was taken on the 3d day of *April*, and the letter was written on the 13th of *April*."

LITLEDALE. "In *Pierson v. Dunlop*,* there was an actual refusal to pay by the *defendant*, and Lord MANSFIELD said, the mere promise to honour a bill, without an inducement to a merchant to take it, is not an acceptance; but from what he had before said in *Pillans v. Van Mirop*,† namely, that a promise to give the bill due honour is an acceptance, Lord ELLENBOROUGH, C. J. thought, as is stated in *Clarke v. Cock*, that the doctrine of *Pierson v. Dunlop*, was narrowed too much. In *Johnson v. Collings*, the bill was not drawn, and it could therefore only be an agreement to accept a bill, and not an acceptance." He concluded therefore that the letter written by the *defendants* amounted to an acceptance of the bill.

PULLER, *contra*. "The last line of the letter, 'we will hope that the state of your funds will likewise enable us to take care of that,' is sufficient to shew, that it was only a conditional promise.

LORD ELLENBOROUGH C. J. "What is the condition? They say, Our prospect of security on the *Chesapeak* is so much improved, that we *shall* accept, or, *certainly*, pay all the bills which have hitherto appeared."

LE BLANC, J. "The uncertain hope which they afterwards express, applies only to the bill for 6,500*l*."

* *Cowp*. 573.

† 3 *Burr*. 1663, 1669.

PULLER. "Taking it, then, as an absolute promise, to accept or certainly pay the bill, this is only a *promise to accept and not an acceptance*. In all the cases, it has been lamented, that any thing but a written acceptance on the bill itself has been received as an acceptance; and altho' it has been held that a collateral promise may amount to an acceptance, yet a distinction has been made, between such a promise, as to a bill already drawn, and a bill not actually drawn; and in the latter case it is not held to be an acceptance. This distinction, that a promise to accept, before a bill is drawn, does not amount to an acceptance, goes in principle to this case; and it is not every promise in respect of a bill that amounts to an acceptance. It must be such a promise as induces credit. In some instances, it has been communicated with the bill. By analogy to the old rule requiring the acceptance in writing on the bill, the collateral promise should be something to be attached to the bill, and something which operates as an inducement to credit. But, here, the bill being overdue when the letter arrived, which contained the promise, it could be no inducement to the holders to give credit to the drawer, for they took the bill long previously. In *Beawes's Lex Mercatoria*, 432. s. 16, edit. 1792, it is said, "if the possessor of a bill of exchange hath neglected to demand an acceptance, before the drawer's failure, and the person to whom it is directed hath advice thereof, he cannot be compelled to accept the draught; though previous to the knowledge of the drawer's misfortunes, he hath acquainted him with his intention to honour his bill."† This, however, he states only as his opinion of the custom, and cites no authority.

Lord ELLENBOROUGH, C. J. "It stands then only as his own opinion. It must be understood of a bill not

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* Sect. 19, 20, &c. contain passages of a similar import. But in a subsequent passage, it is said that a promise to accept a bill is binding as an acceptance.

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drawn at the time of the promise to honour, otherwise, it is not law."

PULLER. "In *Powell v. Monnier*, after the bill was sent for acceptance, *Monnier* kept it in his hands without acceptance ten days, and entered it in his bill-book. The drawer remained in good credit after the 13th.

Lord ELLENBOROUGH, C. J. "That forms no part of the ground of Lord HARDWICKE's judgment. The words 'shall accept or certainly pay,' amount to an acceptance. Suppose a man said, he would not accept, but he would pay, that would be an acceptance. Many men may not chuse to put their names to bills. Is it material when the letter arrives; and does not the promise rather relate to the time when it is written? Otherwise it may depend upon the mere fact of when the seal is broken open. But can that vary the case? Suppose the letter had been put into the post-office, and *Brown* had been in *London*, and had got it there before it was sent to *America*, would that vary the case?"

PULLER "If the promise is not communicated to a third person, it is merely binding between the two individuals by and to whom it is made. It is the same also if by no possibility, any one holder could have been induced, by means of this promise, to take the bill."

Lord ELLENBOROUGH, C. J. "Is not the drawer, after he has assigned the bill, a trustee for the benefit of all the other holders of it; and will not the acceptance enure to their benefit, if this is an acceptance, as between the drawer and the acceptor? The mere fact of detaining the bill in the hands of the acceptor, in *Powell v. Monnier*, would not amount to an absolute acceptance. Lord KENYON used to say that it could only be evidence of an acceptance, but it might be explained. In *Ma-*

son v. Hunt,* the court held that Lord HARDWICKE proceeded in *Powell v. Monnier*, entirely upon the letter."

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PILLER. "Lord HARDWICKE seems to have considered that it was not an acceptance without the circumstance of the letter, but the acceptor had entered it in his bill-book, and therefore the letter does not appear so material, as a foundation for the judgment, as seems to be expressed. In *Clarke v. Cock*, LE BLANC, J. said 'Suppose the letter had been tacked to the bill;' and it was somewhat the idea of Lord MANSFIELD, that it should be attached to the bill. But in this case it could by no possibility be attached to this bill. In all the cases the notion prevails, that it is an inducement to third persons to accredit the bill. This is not a case of communication required to be proved, but of communication absolutely negatived. *Pierson v. Dunlop* went upon another ground, and is rather in favour of the defendants.

Lord ELLENBOROUGH, C. J. "All over the world, if a man says, 'I will duly honour a bill,' without any qualification, it is an acceptance. It cannot be made more explicitly. It is the technical form. Lord MANSFIELD must be only understood as laying down certain qualifications which did not exist in that case, and as obviating some objections, by making concessions to the argument, on the opposite side; but it cannot be considered as his opinion, that it must be attached to the bill. Should we not, if we were to hold it necessary to be so, shake the foundation of all paper credit; or even if we were to hold it necessary to be communicated, in all cases, previous to the maturity of the bill? *Powell v. Monnier* seems directly to this point; but it may be somewhat difficult to reconcile that case in all respects with some of the ex-

* Dougl. 299.

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pressions used in the subsequent cases. In those latter cases there was a communication of the letter before the day of payment of the bill arrived. Is *Powell v. Monnier* to be found in any other book besides *Atkyns*?*

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. "This case, in all its material circumstances, resembles that of *Powell v. Monnier*, 1 *Atk.* 607, the authority of which, as far as we can find, is not shaken by any subsequent decision. The letter of the *defendant*, written to *Aquila Brown*, when the bill in question had been refused, after commenting on the circumstances which before made the property of the drawer to be considered in a questionable shape, particularly what was in the *Chesapeak*, says, 'Our prospect of the property in the *Chesapeak* is so much improved, that we shall accept or certainly pay all the bills which have hitherto appeared.' The first question is, whether this promise is an acceptance. If either branch of the alternative of this expression, 'we will accept or certainly pay,' would be an acceptance, standing alone, surely it cannot be less so because each branch of the alternative is of itself a promise which amounts to an acceptance. A promise to accept cannot be less an acceptance on account of the promise of payment, neither can a promise to pay be less an acceptance because of the promise to accept. It amounts to this, that the *defendants* say, 'whether we send for the bill again is uncertain, but at any rate, whether we do or not, we will certainly pay it.' The time is immaterial at which the undertaking is given; for an acceptance may be after the time appointed for payment, and then it is as a promise to pay on demand; 1 *Lord Raym.* 364; 1 *Salk.* 129. The second question is, whether the bill was taken by the holders on the credit of this promise, and whether they can avail themselves of it. In the case of *Powell v. Monnier*, that which was held an acceptance, enuring to the

* It does not appear to be reported elsewhere.

benefit of the indorsee, was a letter promising that the bill should be duly honoured; the promise was, also, long subsequent to the *plaintiff's* taking it, and was in that case, as well as in this, made to the drawer, and it does not appear the one or the other ever knew of the acceptance on which they relied when the bill became due. Notwithstanding this circumstance, therefore, we cannot say that the *plaintiff* is not entitled to recover; and by deciding that he is entitled to recover, we confirm a rule of law already established, and which, however inconvenient it may be in some respects, we cannot now safely depart from, especially on a subject which of all others, will the least endure uncertainty and change: a subject with which our commercial intercourse with other countries is intimately connected, and on which it is of importance, that, as far as can safely be done, established opinions, which have been long acted upon, should be adhered to."

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JUDGMENT FOR THE PLAINTIFFS.

NICHOLSON and another *against* WILLAN and another.
Nov. 27.

A. delivered goods to B. a common carrier to be carried by the mail; he sent it by another coach, and it was lost: A. brought an action upon the case, with a count also in trover; held, that B. having given notice that he would not be accountable for goods above the value of 5*l.* lost or damaged, unless insured at the time, of which notice A. was cognizant, A. could not recover any thing for the loss. Held, clearly, such a notice is not against the law. Q. however, can the party oblige the carrier to take the goods on other terms, by refusing at the time to be bound by the notice.

THIS was an action upon the case, against the *defendants*, common carriers, for the value of a parcel de-

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livered to them, on the part of the *plaintiffs*, to be carried by the *Leeds* mail-coach and lost by negligence. The first count stated that the *plaintiffs* at, &c. caused to be delivered to the *defendants*, and the *defendants* then and there took, accepted, and received of the said *plaintiffs* certain goods and chattels of the *plaintiffs*, to wit, a certain parcel, containing 20 dozen of silk gloves of a large value, to wit, of the value of 100*l.* of, &c. to be by them carried and conveyed by a certain mail-coach, to wit, the *London* and *Leeds* royal mail-coach, which was to depart in the morning of the same day and year aforesaid, from *Nottingham* aforesaid for *London* aforesaid, to be delivered to the *plaintiffs*, for a reasonable hire, to the *defendants* in that behalf paid; and although the said mail-coach, did afterwards, to wit, on the morning of the same day and year aforesaid, depart from *Nottingham* aforesaid for *London* aforesaid, to wit, at &c. yet the said *defendants*, not regarding their duty, &c. instead of carrying or conveying the said goods, or any part thereof, by the said mail-coach, which did so depart as aforesaid from *Nottingham* aforesaid to *London* aforesaid, or there to wit, at *London* aforesaid, delivering the same, or any part thereof, to the said *plaintiffs*, afterwards to wit on &c. at, &c. wrongfully and injuriously, without the license and against the will of the said *plaintiffs*, carried and conveyed the said goods and chattels from *Nottingham* aforesaid, by a certain other and different coach, not being a mail-coach, and took so little care thereof, that by and through the negligence and improper conduct of the said *defendants* in that behalf, the said goods and chattels were wholly lost to the *plaintiff*, to wit, &c. There were several other counts of a similar nature and also a count in trover. At the trial before Lord ELLENBOROUGH, C. J. at *Guildhall*, the *plaintiffs* proved that the parcel in question was delivered, at the coach-office, to be carried by the *Leeds* mail-coach which passes through *Nottingham*: that it was taken in, to be so carried; the person who took it to the office had seen a board there, containing the fol-

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lowing notice : " Take notice, the proprietors of coaches transacting business at this office will not be accountable for any passenger's luggage, money, plate, jewels, watches, writings, goods, or any package whatsoever, if lost or damaged, above the value of five pounds, unless insured and paid for at the time of delivery, and demanded in one month after such damage is sustained." The mail-coach carried at a higher rate than the other coaches. The parcel was not marked to go by the mail-coach, but the witness saw it entered at 3d. less, than the rate of carriage by the mail-coach, and observed that he used to pay 2s ; and he wondered how it could go for 1s. 9d. the rate then paid. The mail-coach was full on that day, and the carrier sent it by the heavy coach, the *True Briton*. The counsel for the defendant objected, that the *plaintiffs* could not recover, as this parcel exceeded the value of five pounds, being of the value of 58l. The jury under the direction of his lordship, found a verdict for the *plaintiffs* for 58l. with liberty for the *defendant* to move, either to enter a nonsuit or to reduce the verdict to 5l. according as the court should be of opinion upon the case ; and they found that the parcel was delivered and accepted to be carried by the mail-coach.

A rule was obtained to shew cause, why the verdict should not be set aside, and a nonsuit entered ; whereupon

ERSKINE and COWLEY shewed cause, and contended, that the sending the goods by another coach amounted to a conversion : that it was the same as if the party had received it, to be carried by the mail-coach, and had sent it by a private friend, which would also be a conversion, and would enable the *plaintiffs* to recover on the count in trover. That by putting the goods into another coach instead of that for which they were delivered, the *defendants* exposed them to a greater risk than the *plaintiffs* intended to run, and, therefore, although if they had

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been carried by the mail, they must have been their own insurer, yet in this case the notice could not apply, because the carrier had altered the course, of the carrying for which they were delivered. That one may indeed deliver goods to a common carrier to be carried, knowing that himself must be liable for the loss, if they exceed a certain value; but still, if the carrier undertakes to carry them, in a certain way, and does not, he is answerable for the loss: he ought either to send them by the conveyance agreed for, or to return them; and as the goods in this case were delivered to be carried by the mail-coach, and it was full on that night, they ought to have been sent by the next night's mail. Laying the notice out of the question, the *plaintiffs* clearly might recover; and, secondly, they contended that, as the course of the conveyance was altered from the terms of the delivery, then the notice could not at all apply to the case of these goods.

LORD ELLENBOROUGH, C. J. "If the *defendant* obtains the goods to be delivered to him, and enters into the relation of a carrier, upon specific terms, undertaking to carry the goods by a certain conveyance, and he does not put them into that conveyance, it does rather seem, that it is a *conversion*, as much as if he delivered them to another person."

COWLEY, then argued, at some length, to shew, that the notice was illegal and void at common law. "The rule of common law," he said, "was clear and simple, and the security which it afforded to the public was just and ample; the obligation which it imposed upon the carrier could be avoided by no contrivance. Seeing that if carriers were not liable, under all circumstances, the public would be exposed to many frauds, they were bound, at common law, to be answerable for all losses, excepting such as arise by the act of God or the king's enemies. If they wished to avoid being answerable beyond a certain value, they could by no means do it, at least

they could not do it, without making a particular inquiry into the value of the parcel. This strictness may at first sight appear a great hardship to the carrier, but it is founded in a wise policy, and there was no doubt concerning it, until the case of *Gibbon v. Paynton*,* where it is said, the carrier may make a special acceptance. But that case has been, sometimes, misunderstood. It was decided in favour of the *defendant* only on the ground, that a fraud had been committed upon the carrier, by sending a parcel of money, representing it to be something else, and the *plaintiff* himself wrote a letter, in which he admitted that he could not recover. There was, indeed another collateral point, that a carrier might make a special exception not to be liable beyond a certain amount in a particular case. But the carriers grafted upon that a new term, that they might make an *implied* exception, instead of being put to make *express* exceptions which the law required of them before. In the case of *Gibbon v. Paynton*, the terms of carrying, were, that the parties would not be liable for money or jewels, unless insured; but now they go further, and say, they will not be liable for money or jewels or any goods whatsoever, of above the value of 5l. unless insured. Thus, out of that which was, before, a single contract, for carriage and insurance, they have made two contracts, one for the carriage, the price of which is very heavy, and another for the insurance, the price of which they settle as they please." In support of this part of his argument, he cited *Noy's Maxims*, 93, or p. 110. in the last edition: "If a carrier will refuse to carry goods, unless a promise be made to him that he shall not be charged with loss; that will not be good." He cited also *Doctor and Student*, dialogue 2. c. 38. and also *Hyde v. the Trent, and Mersey Navigation Company*, 1 *Espinasse's Rep.* 36; *Allen*, 193; 1 *Str.* 145; *Alcock v. Andrews*, 2 *Esp. Rep.* 542, and other cases.

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* 4 *Burr.* 2293.

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GARROW and WIGLEY, *contra*. "The two arguments for the *plaintiffs* are inconsistent with each other, but admitting all which is said of the simplicity and excellence of the common law, this case falls exactly within the rules of it, and the *defendants* have done what the common law, taking it as it is now laid down, in the argument for the *plaintiffs*, requires. For, this notice is an express request to the *plaintiffs*, to say, at the time, what is the value of the goods which he delivers to be carried; and it is not merely an implied but an express exception, that he, the carrier, will not be liable in a certain case. Of all this the *plaintiffs* have notice, and then, they are bound by it, for it is the same as if they had made an express agreement upon the subject: The counsel for the *plaintiffs* seems to require, that this agreement of special acceptance should be made separately with each customer; but it can make no difference if, as in this case, it is made by a general notice to all persons who come to the office. As to the other point, the *plaintiffs* are bound by the notice, whether the goods are carried by the mail-coach or by the *True Briton*."

LORD ELLENBOROUGH, C. J. "I said, at the trial that the *plaintiffs* could not be in a better situation than if the goods were delivered to go by the *True Briton*, and were entirely lost."

GROSE, J. "Does it make any difference, whether they were lost out of the one or out of the other?"

GARROW. "On any count of this declaration, the *plaintiffs* must shew that the *defendants* were common carriers, and that they took the goods in, and lost them. We say that, under any circumstances, we will not be answerable for goods of more than 5*l.* value; and in this case, the man who took them in was not competent to do so, under any other terms."

LORD ELLENBOROUGH, C. J. "I stated that if there

was a *tortious conversion*, the carriers would be answerable for the whole value; but I did not think that the carrying of them by another coach amounted to a *tortious conversion*."

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WISLEY. "The *plaintiffs* cannot recover upon any count in this declaration. The first count proceeds upon a mistake, as far as it seeks to charge *Willan and Co.* with the loss of the goods. They are only the owners of the mail-coach which goes to the office where these goods were taken in; but they have nothing to do with that office, whatsoever, except the taking in of parcels for this mail-coach. The declaration does not charge him in the usual way in *assumpsit*, but contains a set of mixed counts stating a contract and concluding in tort. Now this parcel was not accepted as is stated in the declaration. because under the notice the proprietors of coaches refuse to carry without insurance, if above 5l. value."

LAWRENCE, J. "They accepted the parcel to carry it, but they refused to insure it. However, the common carriers must not understand that they can impose any terms which they please, upon persons who send goods. They are bound to carry at a reasonable rate: but I do not say you can get at the question in this case."

WIGLEY. "It has been stated that the *plaintiffs* may recover for the 5l. but, according to *Yate v. Willan*,* that cannot be. The *defendants* could not, in that case, pay money into court, nor could we let judgment go by default, because that would be an admission of the contract, and it is not material here that the contract is stated under a *videlicet*, for it was so in that case."

LAWRENCE, J. "How can there be an admission of

* 2 East, 128.

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the contract where there is no contract stated as the gist of the action. *Yate v. Willan* does not apply to this case."

WIGLEY. "The sending it by another coach is perfectly immaterial. The last count is in *trover* in which there must be a *tortious conversion*, and in which form of action the carrier is not liable for a loss by mere negligence. But the sending by another coach is a mere act of negligence, and no tortious conversion. Suppose it had been booked to go in a particular place in the mail-coach, and by the negligence of the book-keeper it had been sent in a different part of the coach, and lost; that would have been merely a loss by negligence, and the carrier would not have been answerable in *trover*."

Curia adv. vult.

And now in this term the opinion of the court was delivered to the following effect, by

LORD ELLENBOROUGH, C. J. "This was an action against the *defendants* being common carriers, for the value of a parcel delivered by the *plaintiffs*, to be carried by the *defendants* from *Nottingham* to *London*, by the *Nottingham* and *Leeds* mail-coach, and, afterwards, conveyed by another coach, and lost by negligence. On the third count* there was no evidence, and, therefore, it must be laid out of the question. The *defendant* pleaded the general issue. On evidence at the trial, it appeared that the *defendant* was proprietor of two coaches, which passed through *Nottingham*; the one a mail-coach, the other a heavy coach. The parcel in question was delivered to be carried by the mail coach;

* In this count, it was stated that the *plaintiffs* delivered and the *defendants* accepted a certain other parcel, for certain hire, to be sent off and conveyed by a certain other mail-coach from *Nottingham* to *London*, and there delivered to the *plaintiffs*, or if the last-mentioned goods should not so be sent off, then to be delivered by the *defendants*, to certain persons, to wit, *A. B.* and *C. D.* at *Nottingham*, to the use of the *plaintiffs*.

but it was in fact carried by the other, the heavy coach. How it was lost did not appear. It was proved that the *defendant* had put up in the office the following notice, of which the *plaintiffs* had notice: "Take notice that the proprietors of coaches, transacting business at this office, will not be accountable for any passenger's luggage, plate, money, or jewels, or any goods lost or damaged, unless insured and paid for at the time of the delivery, and demanded in one month after such damage sustained. The jury found a verdict for the *plaintiffs*, subject to the question, whether it should be entered for 58l. the value of the goods, or for 5l. or a nonsuit should be entered. On the part of the *plaintiffs*, it was contended, that the *defendants* ought to have sent the goods by the mail-coach, or to have sent them back to the consignors, and this was not done in this instance. Secondly, that the loss in question was not incurred in the fair course as a carrier, but by a *tortious conversion*, for which the *defendants* are answerable. But on this point there was no evidence to found this conclusion upon, but the mere fact of the conveying the goods by another coach, and the non-delivery of the goods. It has also been argued, that this agreement or notice is contrary to the common law, and is, therefore, not available by the *defendant*. But, considering the length of time during which such notices have been in use, and the extent of the general opinion and understanding, which now prevails concerning them, under the observation and sanction of the legislature itself; which is said to have, in one instance, refrained from making an exception in favour of certain carriers, by a particular enactment, because it was said that the parties might provide against it by a special notice; considering also that there has been no case in which the right of the carrier, so to limit or restrain his liability has ever been denied; however liable to abuse on the part of the carriers, or to inconvenience with respect to the public, (which we must leave it to the legislature to provide against, we cannot at this time, say that such an agreement or notice is

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contrary to law. In the absence therefore of other evidence, and of any proof of an actually tortious conversion, and seeing that we cannot avoid giving effect to the notice, it follows that the *plaintiffs* are not entitled to recover; and the verdict for 5*l.* must be set aside,

And a NONSUIT ENTERED."

JOHN DOE, on the demise of JACOB WHITEBREAD, Esq.
against ANN JENNEY, Widow.—November 27.

Where there is a custom, in a manor, that upon the death of the tenant for life, he in remainder shall come in and be admitted tenant and pay a fine, it is a good custom, and the tenant must be admitted and pay his fine; although the admittance of tenant for life is the admittance of him in remainder. Q: whether an admittance is necessary and a fine is due without a custom to warrant them? The proclamation to the tenant to come in to be admitted is good in such a case, in general terms, and without naming the particular tenant, although in the surrender he is named specially.

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THIS was an ejectment to recover certain copyhold premises, parcel of the manor of *Utford*, with the *members*, in the county of *Suffolk*, which came on to be tried before Mr. Baron HOTHAM last summer assizes at *Bury*, in and for the said county; and a verdict was found for the *plaintiff*, subject to the opinion of this honourable court, on the following case:—In this year 1787, the lessor of the *plaintiff* purchased, and became, and now is lord of the said manor. In the year 1749, *Edmund Jenney*, Esq. was admitted in fee to the lands in question: upon this admission a full fine was paid. On the 4th of *September*, 1765, the said *Edmund Jenney*, surrendered the lands to the uses of his marriage-settlement, viz. to the

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use of himself for life ; remainder to the *defendant*, then *Ann Brock*, spinster, for her life ; with divers remainders over. On the 10th day of *April*, 1766, the said *Edmund Jenney* was admitted tenant of the lands, to hold unto the said *Edmund Jenney* for and during the term of his natural life, " according to the form and effect of the said surrender, by the rod, at the will of the lord, and according to the custom of this manor, by the rents and services therefore due, and of right accustomed saving every person's right." No fine was paid by the said *Edmund Jenney* on his admission in 1766, as tenant for life under the marriage-settlement, or assessed or paid in respect to the remainders. In *August*, 1801, the said *Edmund Jenney*, the tenant for life, died, and the *defendant* was called on to be admitted, and thereupon she appeared at a court baron, holden in and for the said manor, on the third day of *August*, 1801, and offered to swear her fealty, or have it respited. But she refused to be admitted, insisting at the same time that she was the lord's tenant by virtue of the surrender and admittance of the said *Edmund Jenney*, the prior tenant for life. On this refusal, there was a presentment by the homage, that the said *Edmund Jenney* died seised ; and three proclamations were made at three different courts, that " if any person or persons would come into court and make any just claim, title, in or to all or any of the lands or tenements, holden of the said manor, whereof the said *Edmund Jenney* died seised, such person or persons should come into court, and take admission to the same." And no one coming to be admitted, a precept was issued by the steward of the said manor, under his hand, and dated the 11th day of *December*, 1802, directed to the bailiff of the said manor, authorizing him, in the presence of two or more copyhold tenants of the said manor, to seize into the hands of the lord of the said manor *quousque* the tenant should come into court to be admitted, all such copyhold lands and tenements holden of the said manor by copy of court-roll, whereof the said *Edmund Jenney* died seised as aforesaid, to and for the use of the lord of

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the said manor, *quousque* the tenant comes in to be admitted, and then the lands are specified under a *Videlicet* and the lands were accordingly seized by the bailiff into the hands of the lord, in the presence of two copyhold tenants of the said manor, *quousque* the tenant should come in to be admitted; and after such seizure, the lord of the said manor made the lease in question, on which the present ejectment is brought; and the jury found that there is a custom, within the said manor, that when a person who has been admitted tenant for life of a copyhold estate, holden of the manor, dies, the tenant in remainder, whether for life, in tail, or in fee, shall come in to be admitted, and pay a fine thereupon. Question whether under these circumstances the *plaintiff* in the ejectment is entitled to recover the lands in question?

ALDERSON, for the *plaintiffs*, made two points for the consideration of the court; first, whether, independently of any custom, the *defendant* was bound to come in and be admitted; and, secondly, whether a custom, that, upon the death of a tenant for life, the remainder-man, whether for life, in tail, or in fee, shall come and be admitted, and pay his fine, is a good custom. The tenant will say, on the first question, that the admittance of the tenant for life is the admittance of all in remainder. But this position is to be understood with a limitation, that it is the admittance of all in remainder so as to vest an estate, but not to deprive the lord of his fine. This limitation is similar to that which is applied in the construction of statutes relating to lands. And the general rule laid down for the exposition of statutes, as to their extending or not extending to copyhold estates, is this, that where an act of parliament alters any estate, interest, tenure, or custom, or service of the manor, or doth any thing in prejudice either to the lord or tenant, there the general words of the statute will not extend to copyhold estates; but, where an act is made generally, for the public good, and no prejudice accrues to the lord, &c. there the copyholders are bound by them. So copyholders are within the statute

of limitations; for that is an act made for the preservation of the public quiet, and no ways tending to the prejudice of the lord or tenant. But the 16 R. II. cap. 5, which makes it a forfeiture of lands, &c. to purchase bulls of the pope, extends not to copyhold lands, for the prejudice the lord would sustain, if the king should have the lands.* If, however, it is to be construed as largely as the *defendant's* case requires, it is easy to shew that the party will deprive the lord of his fine in many instances. But it is not necessary to rest this case upon analogy only; for in *Coke's Copyholder*,† it is said, "If a copyhold be surrendered for life, remainder to a stranger, though the admittance of the tenant for life be sufficient to rest the estate in him in remainder, yet, upon the death of the tenant for life, he in the remainder shall be admitted and pay a fine," and "though his estate of tenant for life vests, yet he was never tenant to the lord for his admission to the which he pays his fine." *Gilbert's Tenures*, 194. This is analagous to a *possessio fratris*. If, as in this case, a tenant in fee, surrenders, and takes an estate back for life, he will pay no fine then, as he takes a less estate, and so, as the remainder-man will avoid payment of it, the lord will lose his full fine.

LAWRENCE, J. "How does that follow? May not the lord bring an action for his fine, if the admittance to the estate for life is equivalent to the admission of the remainder-man?"

ALDERSON. "Such an action is not the proper remedy for recovery of the fine in that case, because the lord ought to have, in his own court, the means of compelling the payment of his own fines."

LAWRENCE. "You say then that the lord cannot

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* *Bac. Abr. Copyholder, C. 2.* page 710, 711, 712, ed. 1798.

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be paid till admittance, and therefore, ought to have the means of compelling admittance, in order to compel also the payment of the fine. But if the tenant is admitted and refuses to pay the fine, the lord's only remedy is by action. This previous admission, therefore, may be sufficient to entitle the lord to his action."

ALDERSON then cited *Auncelme v. Auncelme*,* and the *Earl of Bath v. Abney*,† and said, that the former was distinguishable from this case, because the question there was merely on the title of the copyholder to the estate, and not between him and the lord, as to the fine. From the latter case he argued that here was a change of tenancy and of estate on the death of *Edward Jenney* and thereupon an admittance became necessary, and a fine was due.

LE BLANC, J. "In that case of the *Earl of Bath v. Abney*, the parties were admitted for a certain term, the tenant died before the term was expired, so that there was then no tenant, and the question was whether the executor ought to be admitted."

ALDERSON. "As to the second question: the custom is good, as stated, because it is not only certain, but there is a good consideration for it. In ancient times, when the tenant came in upon the admission, he was entitled to the lord's protection and this would be a good consideration for the admission and the fine. Now, in modern times, the tenant has, by admission, the means of making his title manifest and sure. There is therefore nothing unreasonable in requiring admission, in order that, as the lord is entitled to his fines, he shall have also the means of enforcing the payment of them by seizing the premises, until the persons who ought to come in and pay their fines, do so. In former times, also, he had a right to enforce personal

* Cro. Jac. 31.

† 1 Burr. 207.

attendance, for the purpose of performing the services annexed to the tenure. Now, suppose a grant had been made on condition of personal admittance it would have been good; and then the admittance of the remainder-man, merely by the admittance of the tenant for life, would not have been good, under such a grant. On these grounds therefore, he concluded, that, the custom was good in law, to entitle the plaintiff to insist upon the admission, in fact, and not merely in law; and therefore the plaintiff was entitled to recover.

BEST, G. N. *contrâ*. Admittance is only necessary to ascertain who is the tenant to the lord. When *Edward Jenney* surrendered his estate in fee, he took back, an estate for life to himself, and remainder for life; to his future wife, *Ann Brock*, by name: this is very different from a remainder to a man and his right heirs; because, in that case, the lord could not know who would be his tenant. When *Edward Jenney* was admitted, there was no fine paid; upon the principle laid down in *Roe d. Noden v. Griffiths*,* that, where the surrenderor takes back a less estate, no fine is due. The tenant in remainder appears, in the court-rolls, to be tenant to the lord upon the death of the tenant for life, and the case does not state that she refused to pay her fine. In fact, this is a question merely between the tenant and the steward, not between him and the lord; as the steward will be entitled to fees upon the admission. Instead of being a seizure for the fine, it was a seizure for want of admission, which goes *pro defectu tenentis*, whereas here there is clearly a tenant appearing upon the court-rolls. And, upon that, arises a third question, in ad-

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* 4 Burr. 1952.

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dition to those two made on the part of the *plaintiff*, namely, whether the proceedings are regular; for the seizure should have been for non-payment of the fine, and not *pro defectu tenentis*. The *Earl of Bath v. Abdy*,* does not affect this case. In that case, there was a change of tenancy, the executor was a new tenant, and, upon every change of the tenant, a fine must be paid. This case will depend, principally, upon the first question put, on the part of the *plaintiff*. Now though I am to contend that the tenant need not be admitted, yet I need not dispute the necessity of paying a fine. In *Barnes v. Corke*,† it was held by *Powell* and *Rokesby*, the only two judges in court, that, on the admittance of the particular tenant no fine was due, unless there was a special custom of the manor, and it was there held, that what is said in *Brown's Case*,‡ “that the admittance of the tenant for life is the admittance of him in remainder but not to prejudice the lord of his fine which was due by the custom of the manor,” is to be taken as applicable only to cases where it is due by custom; and in his *Copyholder*, as cited above, Lord *Coke* cites no authority; what he says is only his own conclusion, from the two cases in his own reports, in which there must have been a custom for the payment of the fine and the admittance. [Here he cited *Watkins on Copyholds*; but Lord *ELLENBOROUGH*, C. J. said, he ought not to cite the authority of any living author, in any commentary on the laws of *England*.] If the admittance of the tenant for life was not also the admittance of the remainder-man, the remainder-man could not suffer a recovery in the lord's court. But

* 1 *Burr.* 127.

† 3 *Levinz.* 308.

‡ 4 *Rep.* 22 b. at the head of the page, 21, b. 22 b. 23, p. Vide also *Cro. Eliz.* 482.

according to the authority of *Auncelme v. Auncelme* where it is said that "the admittance of the mother is the admittance of the son, for they have but one estate," it is clear that the remainder-man is in the tenancy as actual tenant, more especially where the name of the remainder-man is mentioned in the admittance. Now if A. is admitted, for life; remainder to B. in fee; and B. dies in the life-time of A. the heir of B. must be admitted; which shews that B. was in the tenancy; so, if B. died without heirs then the estate should escheat to the lord; which could not be, unless B. were in the tenancy."

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Lord ELLENBOROUGH, C. J. "What do you mean by being in the tenancy, as distinguishable from being actual tenant? If the *defendant* is actually tenant she must do suit and service; then if she is not, she must have a right to be admitted or rather be under the necessity of being admitted actual tenant, when the estate devolves upon her."

BEST, G. N. "In *Kitchin upon Courts*, 4th edit. p. 244, a case is put where there is a surrender to one for life, and it is said a fine is paid, and where there is a remainder over to another for life, and to a third and his heirs, in this case, he says, "divers learned stewards take but one fine for the whole, but I take a fine for each, though it be but one and a half, for the admittance of the tenant for life is the admittance of all the rest, and they need but one surrender." The reason which is usually given in the books, where it is doubted whether the admittance of the tenant for life is an admittance of the remainder-man, is, that the lord has a right to his fine, but this difficulty does not occur when we admit, that a fine should either be paid at the admittance of the tenant for life or at his death."

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LORD ELLENBOROUGH, C. J. "Have you any case of an action brought for a fine in such case? You do not I suppose, mean any thing different from a custom, in your case delivered to the court; but you make use only of the expression, *constant usage*."*

BEST, on the second question, as to the custom.—
"This custom is void for repugnancy. It does not define any time, when the remainder-man is to be admitted."

LORD ELLENBOROUGH, C. J. "Ought that not to appear negatively, that there is no time limited. We must take it that it is upon the death of the tenant for life, that is, at the first court after; otherwise, the custom is not fully set out."

BEST, on the third point, as to the regularity of the proceedings. "This being a case of forfeiture, the proceedings ought to be strictly regular. The seisure, as was said before, should have been for non-payment of the fine, and not *pro defectu tenentis*. Or else the admittance of the tenant for life would have been sufficient to have enabled the lord to support an action for the fine; for this, however, there is no authority in any reported case. The *defendant* should have been named in the proceedings, in the presentment and the proclamations; her identity was known, although she was not presented by the homage; and when her name appears as the intended wife of the tenant for life, it must be presumed, that the lord knows who is his tenant, and the proceeding should have been against her by name. For this, indeed, there is no authority but general principles, and the practice of the *courts baron*. If a person dies seised

* It appeared that the cases delivered to the *senior* judges were different from those delivered to the two *puisne* judges.

in fee, the homage must present the heir, if he is known; or if he is not known, then they must present that fact. The proclamation should not, therefore, have been general for all persons to come in and be admitted, but for this *defendant*, in particular, to come in and be admitted." He, therefore, concluded that the *defendant* ought to have the *postea*, and relied on the three following grounds argued as above. First, the admittance of the husband was the admittance of the wife; *secondly*, the custom is objectionable; *thirdly*, there has been no instance in which the lord has proceeded for a forfeiture in any such case as the present; which is a strong ground to shew that this is not a proper proceeding."

ALDERSON, *in reply*, distinguished the cases cited on the other side, upon the principles adopted in his former argument, that all those general positions to the admission of tenant for life being the admission of him in remainder, must be understood only of cases where there is no such custom as in the present. And he said, that as to the question put by the court, whether the lord might not maintain debt for the fine, considering the admission of tenant for life as sufficient to entitle him to it, it was admitted that there was no instance of an action brought for the fine, without actual admittance. That the custom finds, that, upon the death of the tenant for life, the remainder-man shall come in and be admitted, which is sufficiently certain. And as to the proceedings for a forfeiture, he said these were warranted by the decision of the court in *Roe d. Tarrant v. Hilier*.*

LORD ELLENBOROUGH, C. J. (cited *Tipping v. Bunning*,† and said, it was there held, "that the

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* 3 Term Rep. 162.

† Moor, 465.

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admittance of a tenant for life of a copyhold is an admittance of him in remainder, and that no fine is due from him in remainder; and the reason assigned by *Popham, J.* is because both have but one estate, and the lord has already admitted to the whole. "The same case is in *Cro. Eliz.* 504, but it is not stated so strongly: the case is in several other books, *Moor* is a very accurate reporter: and the same *dictum* is mentioned in other cases."

LAWRENCE, J. "I do not well understand the distinction that the remainder-man is tenant and is not tenant. He must be either the one or the other."

Cur adv. vult.

And now the opinion of the court was delivered in effect as follows by

LORD ELLENBOROUGH, C. J. "This was an ejectment for copyhold land, tried before Mr. Baron HOTHAM, at *Bury*, and there was a verdict for the plaintiff. In 1787 the lessor of the plaintiff became lord of the manor. In 1749 *Edward Jenney* was admitted in fee, and a full fine was paid. In 1765 he surrendered to the use of his marriage-settlement, and in 1766 was admitted to hold according to the form and effect of the surrender. No fine was paid in 1766 by *Edward Jenney* on his admission as tenant for life. In August, 1801, *Edward Jenney* died, and the defendant was called in to be admitted; she refused, insisting that she was the lord's tenant by virtue of the surrender to *Edward Jenney* for life, and then to herself in remainder. On this refusal there was a presentment by the homage that *Edward Jenney* died seised, and there were three proclamations for the heir to come in and be admitted. On no one coming in, a precept was issued by the steward directed to the bailiff, authorizing him to seise the lands into the hands of the lord of the manor, till a tenant should come in

and be admitted. After seisure was had, the lord made the lease in question, and an ejectment was brought. It was proved that by the custom of the manor when a tenant for life died, the tenant in remainder, whether for life or in fee, was admitted and paid a fine. The question was, whether, under these circumstances, the *plaintiff* was entitled to recover.

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In this case two questions are made; the first and principal question is, whether the *defendant* who claims a copyhold estate, under a surrender, made on her marriage, to the use of her husband for life, with remainder to herself, was, on his death, entitled or compelled to come in and be admitted, there being a custom that when a tenant for life dies, the tenant in remainder should be admitted and pay a fine. The second question is, whether the presentment that *Edward Jenney* died seised, and proclamation made, that if any person came into court, such person should take the admission to the same, was good; inasmuch as the *defendant* was not named in the presentment or proclamation. The *defendant* does not object to pay the fine due by custom from the tenant in remainder, but contends, that the admission of the husband was her admission; and relies on *Brown's* case, 4 Reports, 22, b. and also upon *Auncelme v. Auncelme*, which proceeded upon the ground that the admittance of tenant for life is the admittance of him in remainder. There a copyholder in fee surrendered to his wife for life, remainder to his youngest son in fee and died; *Martha* the wife was admitted, but *Matthew* the son refused to be admitted during the life of *Martha*; afterwards *Matthew*, without further admittance, surrendered to the use of the *plaintiff* in the life of *Martha*, who was admitted accordingly. *Matthew* and *Martha* died; and the son of *Matthew* procured himself to be admitted, and entered, claiming the land: and whether his entering was congeable was the ques-

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tion, because *Matthew* surrendered before admittance. The court determined against the heir of *Matthew*. This last case was much relied upon to shew that the admission of the tenant for life is the admission of him in remainder. On the other hand, it was insisted that there was by custom a fine to be paid by the remainder-man upon the death of the tenant for life. It occurred to my Lord Coke to observe in his Copyholder, that if a copyhold be surrendered for life, the remainder to a stranger, though the admittance of tenant for life be sufficient to vest the estate in him in remainder, yet upon the death of tenant for life, he in remainder shall be admitted and pay a fine.* And admitting the position that the admittance of the tenant for life is the admittance of the remainder-man, as decided in *Auncelme v. Auncelme*, yet on the authority of Lord C. B. (*Gilbert's Tenures*, 194,) it is not such an admission as to make him full and complete tenant to the lord. And further, it was contended that the present tenant was bound to be admitted, there being such a custom, and it being a reasonable one, as the lord will be thereby the better enabled to collect his fines. In addition to the cases of *Auncelme v. Auncelme*, there is also that of *Guppin v. Bunney*, or *Tipping v. Bunney*, in *Moore*,† and other books; where it was laid down that if there is a copyhold for life and a remainder in fee, there is no occasion for a new admittance, for that one fine is only due for both. But without deciding whether such admittance be necessary where there is no custom, we think that such a custom is good, for the reasons assigned by the counsel for the plaintiff. And it is analogous to what respects the heir; who may surrender to another, before admittance; and who, on the death of his ancestor is

* Co. Copyholder, 130.

† 465.

tenant, because the copyhold made to his ancestor belongs to him immediately. And yet, according to my Lord Coke, the heir, before admission, is not complete tenant, to all intents, for he cannot be sworn on the homage, neither can he maintain a plaint in the nature of an assize. In support of the second objection no authorities have been cited; it rested solely on its being the custom of the courts baron to mention the names of those who are to come in upon the proclamations, where they are known. If the tenant was likely to be prejudiced, this would have weight, and though it would be better to mention the person, yet in respect to the heir or remainder-man, the purpose of the presentment is answered. It is to ground a seizure only, until the heir or remainder-man shall come in. The presentment is meant to give notice to those whose tenancy is affected, but it is sufficient for the tenant if the proclamation is made in general terms."

1894.
Doe and
Widdowson
versus
Jennet.

JUDGMENT FOR THE DEFENDANT.

BINGHAM against SERLE.—Nov. 28.

On an inquiry to assess damages to the proprietors for the possession of lands, &c. taken for the use of government, under the stat. 43 Geo. III. c. 55, s. 10, called the general defence act, a compensation in a gross sum cannot be awarded but it must be by an annual compensation in the way of rent to be paid to the persons entitled to the land; and the inquiry will be bad, if all the parties interested are not summoned and properly compensated.

DECLARATION for money had and received, and upon an account stated. **PLEA**, non-assumpsit.

This cause was tried, before the Right Honourable Lord ELLENBOROUGH, and a special jury, at the sittings at Westminster, after the last term, when a verdict was found for the plaintiff with 14,780l. damages and 40s. costs, subject to the opinion of the court.

BINGHAM
versus
SERLE.

1804.

Remond
page
325.

in the following case: The *plaintiff* is the incumbent of the chapelry of Gosport, and the person whose name is mentioned in the warrant and inquisition herein after set forth. The *defendant* is receiver general of the land-tax for the county of Southampton. On the 18th day of November, 1803, the following warrant was issued by Sir John Carter, Knt, and—Fitzherbert, Esq, two of his majesty's deputy-lieutenants for the said county, directed to the sheriff of the county. "To Wm. Mills, Esq. sheriff of the county of Southampton. Whereas his majesty hath authorized the master-general and principal officers of his majesty's ordnance, to survey and mark out the piece or parcel of land or ground, situate at or near Gosport, in the parish of Alverstoke, in the county of Southampton, holden by the Rev. Richard Bingham, under lease from the Lord Bishop of Winchester; and, also, the pieces or parcel of land or ground granted by him for the purpose of erecting a messuage, tenement, or dwelling-house and other premises, for the residence of the incumbent, for the time being, of Gosport chapel, together with such messuage, tenement, or dwelling-house and its out-houses buildings, gardens, and other appurtenances and all other tenements or buildings, being on either of the said pieces or parcels of land or ground, situate near Gosport, in the parish of Alverstoke aforesaid, on a point of land leading to the bridge communicating with Haslar hospital, there holden by Messrs. James Paul and Matthias March, Jun. under lease from the Lord Bishop of Winchester, together with the windmill and other tenements, buildings, and erections, standing therein; and also, another piece or parcel of land or ground, situate at or near Gosport aforesaid, on the west-side of the said point of land, together with the water-mill, messuage, tenement, or dwelling-house, store-houses, erections, buildings and other appurtenances thereunto belonging, also holden by them, under

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BINGHAM
VERMS
SERIES.

lease from the Lord Bishop of Winchester, the same being wanted for his majesty's service; and whereas we, the under signed, two of the deputy-lieutenants for the county of Southampton, have, pursuant to the statute in such case made and provided, issued our warrants, under our hands and seals, commanding possession of the said premises to be delivered to Colonel John Eveleigh, the commanding royal engineer at Portsmouth; for the public service: these are, therefore, to require you the said sheriff to summon a jury to appear and be at the Crown Inn at Gosport in the parish of Alverstoke in the county of Southampton, on Monday the 28th day of November next ensuing the date hereof, at 10 o'clock in the morning, to inquire of and ascertain the compensation which ought to be made for the possession or use of all and every the above-mentioned premises, during the time for which the same shall be required for the public service to the several persons interested therein, and to whom the same ought to be paid. Given under our hands and seals in the 18th day of November, in the year of our Lord 1803; John Carter, Thomas Fitzherbert."—In pursuance of this warrant, the following inquisition was taken on the day, at the place and by the jurors therein named; to wit, An inquisition indented and taken, at the house of C. Blanchard, commonly called or known by the name or sign of the Crown Inn at Gosport, in the parish of Alverstoke in the county aforesaid, the 28th day of November, 1803, before Wm. Mills, Esq. sheriff of the county aforesaid, by virtue of a warrant under the hands and seals of Sir John Carter, Knt. and Thomas Fitzherbert, Esq. two of his majesty's deputy-lieutenants in and for the said county, according to the form of the statute in such case made and provided, to me the said sheriff directed, and to this inquisition annexed, by and on the oath of Cornelius Hayler, &c. who be-

1884.

BINGHAM
v. STURGES
SHELL.

ing sworn upon their oath, say, that the Rev. Richard Bingham, in the said warrant mentioned, is entitled to receive the sum of 14,780*l.* as a compensation for his damages by reason of giving up the premises therein mentioned, to be required from him, for the exigency of government, during the time the same shall be so required, to be paid to him for his own use, and to the further sum of 47*l.* as incumbent of the chapelry of Gosport, to be paid to the said Richard Bingham, to the Lord Bishop of Winchester and to the Rev. John Sturges, doctor of laws, as trustees for the benefit of the incumbent of the chapelry of Gosport, for the time being; and that Michael Mulholland, and Gideon Damiel are entitled to the sum of 30*l.* to be paid to them as a compensation for the damages sustained by them; and that Richard Cuff and James Capillair are entitled to the sum of 1*l.* 12*s.* 6*d.* each, as a compensation for the damages sustained by them respectively; and that Joseph Woolgar is entitled to be paid the sum of 1*l.* as a compensation for the damages sustained by him; and that Nicholas Breach is entitled to the sum of 200*l.* as a compensation for his damages sustained by him; and that Wm. Chubb is entitled to the sum of 6*l.* 10*s.* as a compensation for his damages sustained by him, by reason of the premises in the said warrant mentioned; which several sums we hereby find ought to be paid to the several persons aforesaid immediately upon demand thereof for the purposes aforesaid. In witness whereof as well I the said sheriff, as the jurors aforesaid, have herunto set our hands and affixed our seals the day and year and at the place above mentioned. A certificate of this verdict was signed by the said Sir J. Carter and Thomas Fitzherbert, as such deputy lieutenant, and was, on the 30th. day of November, served, together with the verdict and warrant annexed, upon the defendant who was required by the plaintiff to

pay the sum of 14,782*l.* therein mentioned. The *defendant*, at that time, had money in his hands as such receiver-general sufficient to discharge the same, and promised to write to his deputy, and that there should be no delay in the payment.

1794.
SINCLAIR
VERSUS
SCOTT.

Question, whether the *plaintiff* is entitled to recover? a verdict to be entered for the *defendant*.

SCARLETT, for the *plaintiff*, argued, that he was entitled to recover from the *defendant* the sum of money adjudged to him by this inquisition and verdict for this purpose. He endeavoured to shew that the proceedings were regular, under the terms of the act of parliament, and he answered by anticipation the several objections which he expected would be made on the other side. It will, therefore, be more convenient to state the arguments for the *defendant* first.

GAMBLE, for the *defendant*, stated three objections, to this inquisition and verdict, viz. first, that a gross sum cannot be a proper compensation for a temporary possession of uncertain duration, secondly, that all the proper parties whose interests were concerned and who ought to have appeared before the jury, to have supported their claims to a compensation, did not appear to have been summoned; and thirdly, that the inquisition did not state, with certainty, what *interest* or term the public were to take in the lands, in respect of which the compensation was awarded. "As to the first point, it is not necessary to inquire whether the jury have awarded an adequate, or just compensation, but whether they have been summoned and have made their award of compensation to the *plaintiff*, according to the act of parliament; and whether the inquisition appears, upon the face of it, to be regular? The only mode in which this act of parliament can be fairly executed is, by awarding an annual compensation. And, though

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BINGHAM
VERSUS
SEARLE.

some cases have been put, as instances in which an annual compensation might not be the most convenient, yet those instances are not applicable to the present. At the furthest, they only tend to shew that this is not to be taken as a general rule, without some exception, but they do not affect its application as a convenient rule in this case. The instances put, for the *plaintiff*, such as the case of a compensation for an estate for life, and the like, are those where the party has an *interest*, which, though of *uncertain duration*, is yet capable of being valued by a calculation upon ordinary probabilities, but the interest, which government takes under this act is wholly *uncertain*, for it depends entirely upon how long the government may chuse to make use of the lands, and no value can be put upon it by any calculation. What is the intention of this act of parliament may be collected, *first*, from the terms of the act itself; *secondly*, from a review of former statutes passed for similar purposes, and a comparison of them with this act; and, *lastly*, from the like comparison with an act passed in the last session of parliament, for the purpose of amending this act. The only acts which resemble this are such as were passed for vesting in the crown, certain lands, for the purpose of erecting fortifications upon them; such as 43 Geo. III. c. 66, and 23 Geo. III. c. 80, and the like. In these acts the lands were vested in certain commissioners for a certain time, who were authorized to determine the rights of all parties having any interest in the lands, and their adjudication was to be final; and the lands were vested in them, for the proprietors, until payment of the purchase-money, and afterwards in the crown. Then by subsequent acts, as by 23 Geo. III. c. 71, for instance, a compensation was made to the proprietors, according to the inquisition which had assessed the value, and provision was made for the estates and interests of

1804.

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SCOTCH
SHELL.

different persons in the same land. But this was done only where the object of the crown was, to have the land for a permanancy. The present act, however, has not that object in view. It is to provide only for sudden emergencies, and to empower the government to take possession of land, wherever it may be convenient, for a shorter or longer time, as occasion may require. This is most plainly the construction of the act, as appears not only from the terms of it * which first require the general officer to be put in possession of the land and then direct that a jury shall ascertain, as in this case they are summoned to do, the compensation which ought to be made for the possession of the lands, &c. *during the time for which the same shall be required for the public service, to the several persons interested therein.* And, in the 22d section, the duration of the act is limited to continue only during the present hostilities with *France*. Now, if this had not been the true construction of the act, and a sum in gross was to be given, as in case of a permanent occupation of the lands by government, then there would have been a clause requiring a proper share of the monies to be laid out in the funds or other securities, for the interest of those in remainder or in reversion; but this act contains no such clause: By assessing an annual rent as a compensation all difficulty will be avoided, and each person as he becomes interested in the land will have the rent in lieu of it. Whereas in this very case, there is a sum of 430*l.* awarded to trustees for the use of the minister of the chapelry, for his house, and when the house is given up by the government, he will have both the house which is annexed to his chapelry and the interest of the money. But if it is said that a permanent injury may be done to the house by the

* See the Law Journal, vol. 1, p. 454 and 464.

1809.

DISSENT
 versus
 SENSE.

uses to which it is to be applied, then there is another clause in the act, section 11, which is applicable to such a case. As to the other points, it is clear that the act of parliament intended that all persons having interest in the land should have a compensation. But as it does not direct that it shall be made, *toties quoties*, as often as that interest vests in possession, it should have been assessed by this inquisition, in the nature of an annual rent. And, though it has been said that the Bishop of Winchester might have leased to the *plaintiff* for a long term, at a pepper-corn rent, so that his reversion would be worth nothing, yet that fact does not appear upon the face of the inquisition, although it is stated that the *plaintiff* held on lease from the bishop; and he, as an ecclesiastical person, could not grant such a lease as is supposed in the argument. As to the other point, it is clear that the act does not give the crown a permanent interest in the land, and this inquisition, if it is to be construed to give such an interest to the crown, is bad; whereas, if the act does give such an interest to the crown, then this inquisition is bad, for not stating that it does assess the compensation adequate to such an interest, and what that interest is."

SCARLETT, for the *plaintiff*, argued nearly as follows: "This inquisition, if it is warranted by the act of parliament, is final, and entitles the *plaintiff* to recover of the *defendant*, the receiver-general, who has money in his hand to satisfy the damages. If the inquisition is bad, it can only be so on two grounds, *first*, it may be void for want of jurisdiction, as where the jury is improperly summoned or have no jurisdiction *in rem*, as where the land was not properly demanded or not wanted for the public service; or, *secondly*, it may be void for error upon the face of it in assessing the compensation to the *plaintiff* contrary to the terms of the act. The first kind of objection may

the public money ; if indeed the facts would bear them out, it would be right to take the case as if every thing was regular, previous to the inquisition ; but, if not, the public being interested, the informality could not be corrected. It was understood, however, that the proceedings were in fact regular.

And on this day the opinion of the court was delivered, to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case. " Three objections have been made to the *plaintiff's* right to recover in this action. *First*, that a gross sum, as this appears to be, cannot in its nature be a proper compensation, for the possession which government, is to have of this land, for a period of uncertain duration ; *secondly*, that all the proper parties were not before the jury ; *thirdly*, that it is uncertain on the face of the inquisition what interest the public are to take in the premises in respect of which the compensation is awarded. The right of the *plaintiff* to recover in this action merely depends upon the conformity of the order, and of the inquisition and proceedings thereupon, to the requisitions of the act of parliament ; and if these are found defective they can neither be helped by any intendments nor can we order a new inquisition to be had. If not conformable to those requisitions, the verdict of the jury constitutes no obligation upon the *defendant*, the receiver-general of the county, to pay the sum awarded, and lays no foundation for the implied promise on which the action is brought. As to the first objection, it is not only true, that an annual compensation, to continue for and to be measured by the length of time during which the land shall be occupied for the service of government, is a better mode of assessing a compensation to the *plaintiff*, than by means of a gross sum ;

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but the latter course is a very ineffectual and by no means a just mode of compensation. If it is taken according to the probable time for which the land may be occupied, that may be uncertain, and they may take it either at too high or too low an estimate. If the arbitrators divide the difference and place themselves between the two extremes, it is still inaccurate."

Here his lordship went into a discussion of the arguments for the *plaintiff*, to shew the inadequacy of a compensation by a rent for an uncertain time, as that 'in one year such damage might be done to the land, as would be ill compensated for by a single year's rent,' and the other topics urged by the counsel in the argument; and his lordship shewed, that, as just a recompense might be given by an annual rent, with respect to contingencies, as, considering the nature of the case, could be ascertained, by any mode whatever.

"Perhaps indeed, a gross sum might be awarded upon a fair calculation of the time for which the land should be occupied, and which would be equal to the amount of a rent payable for the same time. But, since it is impossible to say how long the land may be wanted for the service of government, an annual sum to be awarded, for the time and during the continuance of the necessity of government which requires the use, of it, and to terminate immediately upon the cessation of that necessity, will still be the best mode of compensation. A sum in gross may indeed be awarded in many instances upon considering the circumstances connected with an interest of uncertain duration calculated upon an average estimate of the probable continuance of it, and of the nature of the estate which the party has in the land; such as the average of human life, and the calculation of the value of an estate for life. But the present is a case in which no such calculation can be made; for how long the land may be wanted for the ser-

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SARLES.

vice of the public is a thing to which no estimate, even by conjecture, can go. If any gross compensation could be right, it would be one founded upon these principles; but they are not applicable to a subject which must be altogether uncertain in its nature. Indeed under any consideration, this mode of compensating the plaintiff cannot be proved to be right; the most that can be said of it is, that by accident the sums to be paid in the course of time, under the other mode, may amount to the sum now awarded. So, if several sums had been written down and had been put into a hat, the persons who were to assess the compensation might have drawn out the right sum. But could a verdict which should so happen to be right by accident, be sustained for a moment? Certainly not; for of the judge who shall have ascertained a compensation thus at hazard it must be most truly said *licet equum statuerit haud equus fuit*. It is not necessary to decide upon the third objection, as it depends very much on the first, and as, also, the one or the other being sufficient, the verdict must be set aside. As to the other objection, the 10th section of the statute, in terms, directs the jury to award a sum to be ascertained for the possession and use of the ground, during the time for which the same shall be required for the public service, to the several persons interested therein, and to whom the same ought to be paid." And although in this instance, the warrant to the sheriff to summon a jury specifies, as it ought to do, the several lands taken for government, and the persons to whom they belong; and although it expressly states, on the face of it, that the land for which this compensation was to be given, was held under lease from the Bishop of Winchester, so that it appears that several persons were interested in the sum to be awarded, yet the jury have found a compensation for the plaintiff only for his own use, without either compensating the Bishop of Winchester

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for his interest therein, or providing for the payment of the rent which may become due to him. And as the length of the term is no where stated, it cannot appear with certainty that the jury have duly considered the nature of the interest of the Bishop of *Winchester*; and so it cannot be said that they have abstained from awarding any thing to him, because the interest which he may have is so small or so remote as to be of no value. I admit, indeed, that if the reversion of the bishop was, as is supposed in the argument, a reversion after a very long term, it would be very difficult to assess a sum which should be an adequate compensation. However, even on this supposition, a compensation to be paid in the form of an annual rent would at least secure to the reversioner the payment of that which would be the best compensation for his interest be it what it may. As this inquisition appears to us not to be maintainable, the consideration for the implied promise of course fails, and the *plaintiff* cannot sustain his action."

POSTEA TO THE DEFENDANT.

BARING and others *against* CHRISTIE, in Error.
Nov. 28.

No double costs are allowed to a defendant in error when judgment is given for him.

BARING
and Others
versus
CHRISTIE.

UPON a rule to shew cause why the master should not review his taxation of costs, and allow the *defendant* his double costs, under the statute which allows double costs to *defendants* in error;* the *plaintiffs* in error had commenced an action, in the *Common Pleas*,

* 13 Car. II. c. 2.

upon a policy of insurance, and at the trial before Lord *Alvanley* the *plaintiffs* tendered a bill of exceptions. Whereupon a special verdict was had and the cause was brought into this court by writ of error; where there was judgment for the *defendant* in error, who was also the *defendant* below. And the question was, whether the *defendant* in this case was entitled to double costs, in like manner as a *defendant* in error, who was *plaintiff* below, and had recovered a verdict in the court below, would be entitled to them.

1804.

BARING
and Others
VERSUS
CHRISTIE.

GIBBS, for the *plaintiffs* in error, shewed cause, and said that the object of the statutes which allowed costs to *defendants* in error, was to prevent unnecessary delay in staying execution upon judgments below, where the *defendant* in error had obtained a verdict below. That the stat 3 Jac. 1, c. 8, (made perpetual by 3 Car. c. 4, s. 4,) is in terms that "no execution shall be stayed or delayed upon or by any writ of error or *supersedeas* thereupon, to be so sued for the reversing of any judgment in any action or bill of debt upon any *single-bond* for debt, or upon any obligation, &c. (specifying the particular cases to which that act applies) unless the person in whose name such writ of error shall be brought, with two sufficient sureties, shall first be bound unto the party for whom the judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay if the said judgment be affirmed or the writ of error non-prossed, all and singular the *damages and costs adjudged upon the former judgment* and all costs and damages to be awarded for the delaying of execution." So the stat. 3 Hen. VII. c. 10, and 12 Hen. VII. c. 20, which give costs, apply to writs of error brought by *defendants* be-

1804.

WARRING
and Others
versus
CHRISTIE.

low, in delay of execution. He cited also *Bell v. Poth*;* and added that by 13 Car. II. stat. 2, c. 2, "If any prosecute a writ of error for reversal of any judgment after verdict in the courts of Westminster and the judgment is affirmed, they shall pay double costs. And by 8 and 9 W. III. c. 11, after judgment for the defendant below, if the plaintiff bring error, the defendant shall have judgment for his costs. To which is added, in a note in Bacon's Abridgment, 1798, vol. II. page 63, error G." "But not for double costs, for this shall not be presumed merely for delay, since the plaintiff keeps possession of nothing by his writ of error."

LORD ELLENBOROUGH. "How can the other side get over this—for defendants, before this statute, could not have their single costs?"

ERSKINE, *contra*, said that the writ of error delayed the defendant below in his judgment and execution for his costs.

RULE DISCHARGED; no double costs allowed to the defendant.

The KING against JAMES WATSON.—Nov. 24.

A corporation having lands, used as a common of pasture and stocked by such resident burgesses as think fit, according to a certain annual stint fixed by the leet-jury, and for which the burgesses who stock the common pay 19s. 4d. per annum, to each of those who do not: Held, that certain resident burgesses, having such right to stock, and stocking the land, for a certain year, were the occupiers of the land as tenants in common, and were, therefore rateable to the poor's rate,

* There the plaintiff recovered a verdict at the trial, and had judgment in C. B. and upon a bill of exceptions returned into this court, the plaintiff took nothing by his writ, and it was held the defendant could not have his costs.—5 East. 49.

in respect thereof. Q. Whether a mere right of common in gross is rateable?

1684.
The King
versus
Watson.

JAMES Watson appealed to the general quarter sessions, held the 13th of July, 1804, for the borough of *Huntingdon*, against a rate for the relief of the poor of the parish of *St. Mary*, in the said borough; but the rate was confirmed, subject to the following case:—"The mayor, aldermen, and burgesses of the borough of *Huntingdon* are the owners or proprietors of certain large tracts of land within the said borough, used as a common of pasture, and stocked by such resident burgesses of the said borough, in right of their burghership, as think proper to stock, according to a stint annually fixed by the leet jury, who are burgesses of the said borough under the controul of the mayor, for the time being; part of which lands, namely, the mill-common and pits, are in the parish of *St. Mary*, in the said borough, and part in other parishes. That no part of the said commons were ever assessed to the poor's rate; that there are about 80 resident burgesses who have rights of common, some of whom stock to the full of their rights, others partially, and some do not stock at all, but, in the latter case, receive an annual payment of 19s. 4d. in lieu thereof, which is paid by them who stock; that *Edmund Howson, Rebecca Thompson, and Charles Garner*, the persons named in the notice of appeal, are burgesses having right to stock the common, and who did stock in the course of the year 1804.

GIBBS and WILSON, in support of the rate, contended that this right of stocking the common was a mere right of common in gross, not appurtenant to any lands, and therefore, was not rateable to the poor's rate, for there was no instance in any part of the kingdom of a rate upon a mere right of common.

1804.

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versus
Watson.

And they urged many arguments to shew, that a common in gross could not be rateable. For the common lands might extend, as in this case, over several parishes, and, if the right of common was rateable, it ought to be rated in each parish; but the value of such a right, when so divided, would be too small to be worth rating. That though a *Cattlegate* is said in some cases to be rateable, yet this right bears no resemblance to it, for a *Cattlegate* is a tenancy in common. That it does not appear that the parties not rated are resident in the parish of St. Mary; for, although they are burgesses, yet the *Borough* comprehends another parish. That, upon the same principle, that this right of common is rateable, a right of *turbary*, or of getting sand on a common must be rateable. That, it was not necessary to say whether the corporation might be rated or not; but that, if any party should be rated, it must be the corporation, since they are the owners and proprietors of the land and soil of the common fields, and the right of stocking the common being merely by their permission, and so constituting no tenancy, it was as land of which the owner, having no tenant, must be presumed to occupy it himself, and is therefore according to the case of the *King v. Gardiner*,* rateable for it himself. That these persons could not bring an action of trespass for any injury done to the land, and, therefore, could not be said to be the occupiers of it. That the statute of the 43d *Eliz.* imposes the rate on the occupiers of the land. And they resembled this case to the case of the *King v. Jolliffe*,† in which a *way leave* being a mere easement, was held not to be rateable; and they distinguished it from the case of the *King v. Bell*,‡ because there the party had inclosed the *way*

* *Coup.* 79. † 2 Term Rep. 90, ‡ 7 Term Rep. 598.

late, and possessed it as occupier, so that it was not a mere easement, but a possession of the lands.

1804.

**THE KING
VERSUS
WATSON.**

ERSKINE and BEST, G. N. *contra*, cited the case of the *King v. Aberavon*,* as in point, but Lord EL-

* The above case of the *King v. the Inhabitants of Aberavon* was decided this term. The case was as follows: *Glamorganshire, Michaelmas Quarter Sessions, 1803—David Jones, appellant, v. the Churchwardens and Overseers of the Poor of the Parish of Aberavon, respondents.*—CASE: The parish and town and borough of *Aberavon*, in the county of *Glamorgan*, are co-extensive; they have church-wardens and overseers appointed in the common way like all other parishes; the portreeve, aldermen, and burgesses of which, some of the latter reside within the borough and parish, some without the borough and parish in the neighbourhood, and others live in different other parts of the principality and kingdom, are seised in fee, in their corporate capacity, of certain inclosed lands to the amount of acres, and they are also in like manner seised of two or three hundred acres of uninclosed marsh lands, called *Aberavon Marsh*, and of about one hundred acres of mountain; the marsh is worth about 8s. an acre and the mountain is worth about five shillings an acre; the inclosed land is annually parcelled out between the resident burgesses who occupy the same as tenants, paying certain specific rents, according to the size and value, to the corporation; these inclosed lands are charged to the burgesses, the renters, in the rate, as occupiers in proportion to their several rents; and divers burgesses, as occupiers, pay the poor-rates, and also the land-tax, to which the inclosed lands is also rated in the poor-rate. The inclosed lands are charged as under:—"The burgesses lands" (which covers the 3 columns in the other part of the rate, reserved for landlord, tenement, and occupiers,) "*Pollard Jones*, valuation 2l. 8s.—16s.—The Corporation have not any live stock, by which means they can occupy, nor any personal chattels except their maces and halberds. The uninclosed marsh and mountain have never been

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LENBOROUGH, C. J. observed "that the furthest the court went, in that case, was to decide that land was

charged with either land-tax or poor rate, they are occupied as common land by the individual burgesses or their widows, who are resident and keep stock to occupy; but those burgesses who have not any stock, or are now resident, do not receive any benefit from the same. The burgesses do not permit any persons but burgesses or their widows to claim a right of pasturage on these uninclosed lands; but they suffer some poor persons, by way of charity, and in the ease of the parish who are residents, not being burgesses, to depasture; of those who depasture, every person occupies according to the quantity of his stock, so that one occupier may have 18 head of cattle and 100 sheep, there being no limitation; and another not more than one cow, or one horse, or even one sheep. In a rate made for the relief of the poor in the town and borough of *Aberavon* on the 11th of July, 1803, the uninclosed marsh and mountain lands are as usual left out, and D. Jones gave the following notice of appeal against that rate: "*Glamorganshire*—to the church-wardens and overseers of the poor of the parish of *Aberavon*, in the said county, and also to the portreeve, aldermen, and burgesses of the town and borough of *Aberavon*, in the said county, and to each of them, take notice that I will, at the next general quarter sessions of the peace, to be held in and for the said county, lodge and prosecute an appeal against the present subsisting rate or assessment, made for the relief of the poor within the said parish of *Aberavon*, in the said county, and my reasons for lodging and prosecuting my said appeal are as follows, (that is to say) because you have omitted to rate or assess in the said rate or assessment all the marsh lands in the said parish of *Aberavon*, called *Aberavon Marshes*; and all that hill or mountain called *Aberavon Hill* or *Mountain*, all which said premises are in the occupation of you the said portreeve, aldermen, and burgesses of the said town and borough of *Aberavon*, in the said county; and I do hereby give you the said church-wardens and overseers of the poor of the said parish of *Aberavon*, in the

rateable in some persons." They then contended that here, though the property in the land was in the cor-

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said county, further notice to produce on the trial of the said appeal the present subsisting poor-rate, made for the relief of the poor within the said parish of *Aberavon*, in the said county, dated the 26th day of *Sept.* 1803, *D. Jones*."—This notice was served on the church-wardens and overseers of the poor, and on the portreeve, aldermen, and one or two of the principal burgesses, so that it was admitted to have been good service on the corporation in their corporate capacity, and it was also admitted to be well served on the overseer of the poor, the portreeve being the then overseer of the poor; but the majority of the resident burgesses, and other persons who were occupiers, of the said uninclosed lands were not served, and a number of out-dwelling burgesses within the said county and the jurisdiction of the court were not served. This appeal came on to be heard before the justices at the *Michaelmas* quarter sessions for the county of *Glamorgan*, and the question before the court was, 1st, whether these uninclosed lands should, under the circumstances of the occupation, be rated at all; secondly, whether, if they were rateable, the portreeve, aldermen, and burgesses were to be considered as occupiers, and to be rated assuch, and notice of appeal to them, in their corporate capacity, was sufficient; or whether the several and respective burgesses and other persons, who were the actual occupiers, were not the persons to be rated, and that in proportion to their several and respective stocks, and if such persons were to be rated, whether the court could quash or amend the rate without such persons first having notice under the statute of 41 *Geo. III.* entitled an act for the better collecting of rates made for the relief of the poor; cap. 23, s. 6, which they had not. The court of quarter sessions quashed the rate, subject to the opinion of his Majesty's court of *K. B.* upon the above case. Wood, Clerk of the Peace.

I heard only part of the argument and was absent in the court of *Exchequer*, when it was decided; but, in this case, *LAWRENCE, J.* read his note of it to the following effect:

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poration, yet these persons had the beneficial occupation, the manner of which was to be settled by the leet jury.

LAWRENCE, J. "Must not trespass be brought by the persons in possession, and is not *occupation* possession? If these persons are the occupiers, does not that shew that the corporation cannot maintain *trespass*, without joining these occupiers, at least?"

BEST, "This right is a tenement: a common in gross is a tenement so as to confer a settlement, and is therefore capable of some sort of occupation; and these persons, though they may not be capable of maintaining trespass, may yet have an occupation of such a sort as to be rateable in respect of it. The personal residency does not come in question here, for *tithes*, with respect to which there is no personal occupation by residence, are rateable. Whether, therefore the parties can maintain trespass may not be material; they may at least maintain some other action to vindicate their right."

LAWRENCE, J. "Does it not shew, if they cannot maintain trespass, that they are not occupiers; and,

"The court was of opinion, that there was a considerable quantity of land which ought to be rated, and that, for want of its being so rated, the court of quarter sessions did right in quashing the rate. On that ground, therefore, this court confirmed the order of sessions." He afterwards added, "In the case of the *King v. Aberavon*. We did not decide, that the burgesses, there, were liable, but we only said, the sessions have quashed a rate; in that rate, there appears a large tract of land which ought to been rated, as to some one or other; and, therefore, we cannot say that the quarter sessions have done wrong, in quashing the rate: but we did not say who ought to be rated,"

if occupation means the same as possession, is it not a very material question whether they can maintain trespass, as for an injury done to the possession? Tithes are rateable by the express words of the statute; and the owner is made rateable, as the occupier, by the statute."

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LORD ELLENBOROUGH, C. J. in delivering the judgment of the court, "all the cloud and obscurity which has been thrown over this case, all the difficulty in which it has been involved, has arisen merely from a misconception of the proper nature of the right which these persons have; from the fallacy of considering this as a mere right of common in gross. In fact, however it is no such thing. The corporation are the owners of the land on which this right is exercised. They annually dole out the occupation of it according to a certain stint fixed by the leet, to the burgesses, who are resident and think proper to stock it. Such of them as do not occupy, that is to say, do not stock it, have a compensation of 19s. 4d. each paid to them by the rest. In other words, the whole number of resident burgesses are entitled to the occupation; but as they may vary in number, it becomes necessary to ascertain annually in what manner each shall occupy it, so as to render it mutually beneficial to all. What is there, then, to distinguish this from any other mode of occupation of lands? Nay, under this view of the case, they can maintain trespass for any injury to their possession, subject to a plea in abatement if all do not join. Their occupation of this land is not a mere right of common, but an actual occupation of the land in common, and they are tenants in common, and are rateable as such. Common of pasture has been considered as if it is incapable of being rated; and, as there is no instance of such a rate being ever made, it may form a strong presumption that it is not rateable; but be that as it may, here is an actual

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occupation of pasture land in common capable of being locally ascertained. It is a beneficial occupation, too, of which the value is ascertained, inasmuch as those who occupy pay a rent for it to those who do not; whether they pay sufficient to make it an object of taxation to the poor's-rate is a matter for consideration below. We, however, cannot say that a rent of 19s. 4d. is not a matter fit for a rate. These persons are the occupiers of the land, and, as such, are rateable.

GROSE, J. "The question is, whether the occupier of certain pasture lands and common fields are to be rated for those lands which they so occupy, under the particular circumstances of this case. Now the land, here, is a common which belongs to the corporation. This is divided out annually amongst the resident burgesses, to be occupied by them, according to a certain stint, which is fixed by the leet jury. These persons, then, are nothing more or less than tenants in common, and thus are in possession of the land which belongs to the corporation. Have they or not any thing in the parish which is of worth to be rated to the poor? The case answers that, for it shews that it is worth at least 19s. 4d. per annum. They have then a local and beneficial occupation, and the question is resolved simply into this, whether land of which there is a local and beneficial occupation ought to be rated?"

LAWRENCE, J. "I am of the same opinion. The question is, whether these persons are to be considered, during the year, occupiers of the land. This land indeed belongs to the whole corporation as owners, but the resident burgesses are entitled to have it divided amongst them annually, and that division becomes necessary to be made every year, from the number of persons who are resident burgesses constantly varying. As to there being an action of trespass to be brought by the occupier of the land, I thought, that a considerable concession was made in the argument, when it was

said, that the corporation could maintain *trespass*; for that was admitting that these persons were not occupiers, but that the corporation was the tenant and occupier of the land. Tithe is also an incorporeal hereditament, yet a person may maintain trespass for taking it away, as *trespass de bonis asportatis*, when it is severed from the land; but I do not know that a person who has an incorporeal hereditament as a mere right of common, could maintain trespass. In this case the parties may maintain trespass for an injury to the lands, during the year for which their stint is fixed. As to whether a mere incorporeal hereditament, such as a right of common in gross, is rateable, that may raise a question of some importance."

LE BLANC, J. "See the situation in which these persons stand. Here is a common field, a quantity of land which belongs to the corporation. How is it enjoyed? Not by the corporation in their corporate capacity, but every year there is a calculation made, and it is parcelled out by the leet-jury according to what proportion it shall be occupied by the resident burgesses; for as the number of resident burgesses must vary, it is necessary to say what number of persons' stock this land will carry each year. The fee in the land is vested in the corporation, as a body, for the benefit of the resident burgesses, and they are the occupiers of the land. According to this construction of the case, it steers clear of all the difficulties proposed to us, in the argument, as to the rating of an incorporeal hereditament, such as a mere right of common extending over lands in different parishes. There may be a difficulty in rating so great a number of persons as may be entitled to such a right, but here the parties have the beneficial use of the lands, during the year, and they have at the same time, if I may so call it, an *equitable estate* in the whole of the lands."

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- **By THE COURT.** "The rate, not to be quashed, but to be amended by inserting the names of the above three persons who are not rated.

Ex parte W. SAUNDERS.—Nov. 27.

Applications, upon special circumstances, to be admitted, an attorney must be made by petition to the judges, at the treasury-chamber, and not by motion to the court. But under statute 37 Geo. III. c. 90, s. 31, where an attorney has discontinued practice, and is therefore struck off the rolls, for not paying the certificate duty, he must apply by motion to the court, and state, upon affidavit, how he has employed his time during the interval of his suspension from practice. In all such cases the court will impose some penalty.

*Ex parte
SAUNDERS.*

ABBOTT applied to the court for a rule to shew cause why one *Saunders* should not be admitted an attorney. He had before applied in the usual way to one of the judges, to **LE BLANC, J.** at chambers, who entertaining some doubts, on his case, a petition was prepared and presented to the judges, at the treasury-chamber. This petition, with all the affidavits, were put into the hands of a person in the treasury-chamber, and were accidentally lost. He now, upon an affidavit of this fact, and stating also that he could not procure a new affidavit of service, applied to this court for relief, and to permit his case to be inquired into, and that he should be admitted.

LE BLANC, J. "I remember the case well. I was of opinion that he was not entitled to be admitted. I afterwards mentioned it to the judges, who were of the same opinion, and desired that a petition might be presented. It was so presented, and the judges were of the same opinion. If he had any right to be admitted, I could furnish him with the dates and minutes of the papers which are lost, and I believe he will suffer nothing from the loss of his original affidavits.

THE COURT then directed, that a petition should be presented in the usual way, at the treasury-chamber.

In another case, **ESPINASSE** moved, upon the last act of parliament imposing duties on attorneys, 37 Geo. III. c. 90, s. 31, that an attorney should be readmitted, upon payment of the arrears due for annual licenses during such time as he had discontinued from practising. He produced an affidavit of the attorney himself stating, that " he had been admitted on the 11th of June, 1796, and had practised and regularly taken out his certificate from that time till 1802, when he discontinued practice, and neglected to take out his certificate. That his reasons for so doing were, that his father having carried on trade for several years, died, and he then intended to go into trade; and he so discontinued practice solely for the reasons above assigned, and not through any fear of censure," &c. THE COURT required this affidavit to be made, in order to know what the attorney had been doing in the mean time, and now observed that the affidavit did not state in what manner he had employed his time; **ESPINASSE** stated that he had been doing nothing, and that he did not enter into trade, as he had intended.

By THE COURT. The act requires that we should fix some penalty. Let him pay the arrears of the duty 5l. and also 5l. by way of penalty.

GUILLIAM against **BARNETT**, Gent. one, &c.

Nov. 28.

Where an attorney had wholly prepared and signed a bond to pay money to his client, upon a wrong stamp, he was compelled upon motion to put a proper stamp upon it; but, though the only subscribing witness was his own servant, at the time of the execution, the court refused to compel him to admit the execution of the bond, he swearing that he did not then know where such witness resided.

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: Ex parte
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WILLIAM
SERVIS
BARNETT.

IN an action of debt, upon a bond given by the *defendant*, as obligor, to the *plaintiff*, a rule was obtained to shew cause why the *defendant* should not procure the proper stamp to be affixed to the bond, and why he should not, upon the trial of the cause, admit the execution of the same. "This was obtained, upon an affidavit, that the bond appeared to be executed by the *defendant*, and was attested by one S. W. who, at the time of the execution thereof, was a servant to the *defendant* and a person of whom the *plaintiff* had no knowledge, and that the bond was wholly prepared by the *defendant*. Upon shewing cause, *Barnett* swore that the subscribing witness to the bond had quitted his service, and he did not then know where she lived.

Lord ELLENBOROUGH, C. J. "He is liable to put the proper stamp on the bond; for in *Coggs v. Barnard*,* it is laid down, a mere volunteer is liable for any loss which accrues through his own gross negligence, and nobody can say that an attorney is not guilty of gross negligence, if, in his own case, he neglects to put such a stamp upon the bond as will make it an available security. With respect to the other part of the rule, he denies that he is now acquainted with the residence of the witness."

THE RULE ABSOLUTE, as to putting a proper stamp upon the bond.

WOOD against JENKINS.—Nov. 28.

If the affidavit of debt, to hold to bail, omits wholly to negative the tender of the debt in bank-notes, the defendant is entitled to be discharged upon ~~the~~ common bail; but a mere

* 2 Lord Raym. Reports. 909

*slip or defect in the manner of denying such a tender to
aided by statute 43d Geo. III. c. 18.*

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READER obtained a rule to shew cause why the *defendant* should not be discharged out of custody upon filing common bail, for a defect in the affidavit of debt, in order to hold the *defendant* to bail. The defect was that the *plaintiff* had wholly omitted to swear whether the *defendant* had or had not made a tender of the amount in bank-notes. This he contended, was not cured by the clause in the recent statute of the 43d Geo. III. c. 18, which only goes to aid any *defect*, in such part of the affidavit as negatives or is intended to negative the tender of bank-notes.

WIGLEY, *contrd.*

LORD ELLENBOROUGH, C. J. "Certainly the act was intended to cure slips in the expression of such parts of the affidavit of debt, as were applied to the tender of bank-notes, and not to help a total omission; for that would be to repeal the clauses of the former acts.

RULE ABSOLUTE.

PRESTON and Others *against* STRATTON and another.—Nov. 28.

Evidence of facts arising abroad are not evidence to be referred to the county in England where the venue is laid, so as to satisfy the undertaking to give evidence in that county, upon bringing back the venue; and the case of Gerrard v. De Robeck, 1 H. Bl. 282, has not since been acted upon.

ON a rule to shew cause, why the *venue* in this cause should not be brought back to *Norfolk*, and the rule for changing the *venue* from *Norfolk* to *London* be discharged, it appeared on the affidavit of

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one of the *plaintiffs*, that the action was brought originally on an agreement, for freight and demurrage on a charter-party, dated at *London* in *May* 1803, and entered into between the agent for the *plaintiffs* and the agent for the *defendant*, whereby it was agreed that the *plaintiffs'* ship, the *Duke*, of *Yarmouth*, should proceed to *Petersburgh*, and there take in a lading for the *defendants*; and it was agreed that fifty days should be allowed for demurrage at *Petersburgh* and *London*. The *defendant* had sworn that the freight was paid on the ship; and the only question in the cause now was, what was due for demurrage which arose at *London*? The *plaintiff* stated in his affidavit that the vessel went her voyage, that she loaded at *Petersburgh*, and was detained by the *defendant's* factors, or their agent, thirty-five days, and that the said factors signed a certificate indorsed on the said charter-party, acknowledging that the said vessel was detained in loading at *Petersburgh* thirty-five days; that these several circumstances aforesaid are material to be given in evidence; but that, happening or arising in a foreign country, they could not undertake to give the same in evidence as matter arising in any county in *England*, and that the same ship belongs to *Yarmouth*, and is registered there; and that the three *plaintiffs* and the captain of the ship live at *Yarmouth* or in the neighbourhood.

BEST, G. N. for the *plaintiffs*, cited *Gerard v. De-Robeck*,† in which it was held that evidence of a contract made at *Bourdeaux* would be good evidence of a contract where the venue was laid, so as to satisfy the rule which requires that, when the venue is brought back, the *plaintiff* should give evidence arising in the county to which it is removed.

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LE BLANC, J. and LAWRENCE, J. said they thought that case had never been acted upon since. And Lord ELLENBOROUGH, C. J. mentioned a case of an action upon a bond where the only question arising upon the pleadings was upon the proof of a set-off, and all the witnesses lived at one place, and there the court refused to change the venue. And added, that it would be best to adhere to the strict rule, that the *plaintiff* is entitled to lay his *vouch*, in transitory actions, wherever he pleases, unless the *defendant* will swear that the cause of action arose in another county, and that then it should only be brought back by an undertaking to give material evidence elsewhere.

RULE DISCHARGED, venue to remain as changed by the first rule into *London*.

MAXWELL against SKERRETT.—Nov. 23.

A demand of plea may be made before a rule to plead is given.

RULE to set aside proceedings for irregularity, on the ground; that the demand of a plea was made before the rule to plead was entered, and after the expiration thereof judgment signed, without any other demand of plea.

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READER, who shewed cause, cited *the churchwardens of Edmonton v. Osbaldestone*, * where it was held, "that a demand of plea may be made, at the time of delivering the declaration.

MARRYAT, *contra*, contended that in the case cited the declaration was delivered, the plea demanded, and the rule to plead entered on the same day; but, in this case the demand of the plea was indorsed on the decla-

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ration and the rule to plead not entered till three days afterwards; and if the demand of plea could be so made it would give in effect no serviceable notice to the *defendant*; for it was of no avail without a rule to plead and then, in order to know when he was bound to plead the *defendant* must search for the rule to plead *prospectively*, or rather every day during the term.

Lord ELLENBOROUGH, C. J. after consulting the master; "the master thinks this judgment is regular; though in the natural course of things, it should have seemed, that the plea ought to have been demanded only after the rule to plead had expired.

RULE DISCHARGED.

HENRY PEIRSON against ROBERT VICKERS ANNE his WIFE and others.—28th Nov.

A. devises all his freehold and copyhold estates, whatsoever, situate at E. with all and every of their appurtenances, unto B. and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common, and not as joint tenants; and in default of such issue to C. and D. for life; remainder to trustees, to preserve, &c. remainder to all and every the child and children of C. and D. whether sons or daughters and their heirs: held, B. took an estate tail.

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VICKERS.

GENTLE MORRIS, late of Belton, in the county of Lincoln, deceased, by his last will and testament, in writing, dated the 12th day of October, 1789, (duly executed and published by him in the presence of and attested by three credible witnesses, gave and devised all his freehold and copyhold estates whatsoever, situate at Belton, in the county of Lincoln, which copyhold estate, he had surrendered to the use of his will, with all and every their appurtenances unto his daughter Ann meaning the said *defendant Ann Vickers*, and to the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common,

and not as joint-tenants, and in default of such issue the said testator gave and devised the said hereditaments and premises to his sisters, the *defendants*, *Mary Vickers* and *Jane Preston*, for their joint lives, with remainder to trustees to preserve contingent remainders during the lives of his said sisters, and from and after the decease of either of the said last named *defendants*, the said testator's sisters, the said testator gave and devised the said hereditaments and premises unto all and every the child and children of his the said testator's said sisters, whether sons or daughters, and their heirs and assigns for ever as tenants in common, and not as joint-tenants. That the said testator died soon after making his said will, without having revoked or altered the same, and upon his death his said daughter *Anne*, the above named *defendant*, *Anne Vickers*, or her husband, in her right entered into the possession or receipt of the rents and profits of the said freehold and copyhold estates of the said testator, devised to her as aforesaid, and hath ever since been and now is in the enjoyment thereof. That the said *defendants*, *Mary Anne Vickers*, *Mary Vickers*, *Mary Halderby*, *John Vickers*, *Joshua Vickers*, *Elizabeth Vickers*, *Charles Vickers*, and *Gentle Vickers* are the children of the said *Anne Vickers*, the said testator's said daughter.

That the said *Robert Vickers* and *Anne* his wife, having been advised that she took an estate in tail general in the said freehold and copyhold premises, in the said parish of *Belton*, under by virtue of the said will; they the said *Robert Vickers* and *Anne* his wife, in or as of *Hilary* term, in the 41st year of the reign of his present majesty, duly suffered a common recovery of the said freehold estate and premises in that parish; and by certain indentures of lease and release, dated respectively the 6th and 7th days of *February*, 1801; duly executed by them for the purpose leading or de-

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clarifying, the uses of such recovery, it was declared and agreed that the said recovery, as to certain parts of the said freehold estate, (comprehending and including those parts of such estates which are the subject of the suit herein after mentioned, and upon which the present question arises should enure to such persons for such estate under such powers and in such manner and form as the said *Robert Vickers* should by deed or will, to be executed and attested in the manner in the said release mentioned, direct, limit, or appoint; and in default of such direction, limitation, or appointment to the use of the said *Robert Vickers*, his heirs and assigns for ever.

That the said *Robert Vickers* having been also advised that by the means aforesaid he had acquired an estate in fee-simple, or a power of conveying an estate in *fee-simple* in such of the said devised freehold premises as to which the uses of the said recovery were declared as aforesaid, he some time after the suffering of such recovery entered into an agreement in writing with the plaintiff, *Henry Pierson*, for the sale to him of certain parts of the said last mentioned premises; but the said *Henry Pierson*, objecting to the title of the said *Robert Vickers* thereto, and contending that the said *Anne Vickers* took only an estate for life in the said freehold premises, under and by virtue of the said will, he the said *Henry Pierson* exhibited his bill in the court of Chancery, against the said *Robert Vickers* and *Anne* his wife, and the said several other parties, *defendants*, for the purpose of having the said agreement carried into execution, if it should appear that a good title could be made to the said estate and premises so contracted for, and if a good title could not be made, then to have the said agreement delivered up to be cancelled; and the said several *defendants*, having put in their answer to the said bill, the said

cause came on to be heard before his honour the Master of the Rolls, on the 23d day of December, 1803, when his honour was pleased to direct a case to be made and stated for the opinion of this honourable court upon the following question :

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What estate the said *Anne Vickers* took or acquired under and by virtue of the said will in the freehold premises in question ?

HOLROYD, for the plaintiff contended, on the authority of *Doe v. Cooper*,* and *Doe d. Candler v. Smith*, that *Anne Vickers* took an estate tail; that the words, heirs of the body passed the estate tail, and the words *whether sons or daughters*, were meant only to confirm the same intent, and did not convert them into words of purchase. That it was the intent of the testator to continue the estate in the issue of *Anne Vickers*, and he did not intend that it should go over until a general failure of issue. That if *Anne Vickers* took an estate for life, and the children took as purchasers, there would be no devise to their heirs, nor no cross-remainders between them, and thus his primary intent would be defeated. He cited also *Robinson v. Robinson*,† and *Poole v. Poole*,§ in which all these cases were recognized, and also the opinion of WILMOT, C. J. in *Roe v. Groom*.||

WOOD, *contra*. "There is no doubt on the first words of the will but *Anne Vickers* takes an estate tail; but the next words, *whether sons or daughters*, controul the construction, and *Anne Vickers* takes an estate for life, with remainder to her children as purchasers in fee. The word estate here would carry

* 1 East, 229. + 7 Term Rcp. 531. † 1 Bur. 38.

§ 3 Bos. and Pul.

|| Wilm. Cases and Opinions.

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a fee to the children; but in the other cases there was only a devise of *messuages*, &c. which would not carry the fee to the children; and it was then necessary to construe it an estate tail in the first taker, otherwise the main intent of the testator would be defeated; but not so here, for the intent of the testator will be carried into effect by giving the children of *Anne Vickers* an estate in fee by purchase; and this is the more probably his intent, because in the next devise, he gives an estate in fee to his sister's children, and he could not be supposed to have given a less estate to his daughter's children. "In default of such issue," does not mean a general failure of issue, but in default of such issue at the time of her death."

LAWRENCE, J. "The general rule is, that the words, *in default of issue*, mean a general failure of issue, unless from some part of the will you can collect a different intent. The only circumstance to have borne you out in that construction would have been, if it were given to *Anne Vickers* and her husband for their lives, and then in default of issue remainder over."

HOLROYD, in reply. "If the word *estate* is to carry a fee to the children of *Anne Vickers*, and the words *heirs of the body*, do not make an estate tail, they should give an estate in fee to *Anne Vickers* rather than to her descendants. But it is clear that the children do not take an estate in fee, because the estate is given over to other persons, then in being. In *Doe d. Candler v. Smith*, there was a limitation "to *Anne Askew* and the heirs of her body for ever;" and yet it was held an estate tail, because it went over in default of issue. That was a stronger case for the *defendant*; here the words are, whether sons or daughters; and there is a great difference between that expression and the

words as well sons as daughters: this clearly means whether *the heirs of the body* are sons or daughters they shall take, and is only a fuller description of an estate tail general."

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LORD ELLENBOROUGH, C. J. observed, that the cases cited of *Doe v. Candler* and *Smith*, and *Doe v. Cooper*, were very strong.

LAWRENCE, C. J. referred to *Doe d. Candler v. Smith*, to shew how *Lord Kenyon* was pressed with the particular intent of the testator, because the devise was expressly for life; and he added "the word *estate* may be understood as a word of local description, and it is coupled with the words *all and every of the appurtenances*; now the word *appurtenances* has a meaning if the word *estate* is a local description; but *estate*, if it conveys the whole interest, carries the appurtenances alone."

LE BLANC, J. "In every case of this description the rule of law prevails against the particular intent of the testator."

Afterwards the court certified that *Anne Vickers* took an estate in tail general.

CASES

ARGUED AND DETERMINED

In the Court of King's Bench,

IN HILARY TERM,

In the 45th Year of Geo. III.

1805.

ROE on the demise of the EARL of BERKELEY against
the ARCHBISHOP of YORK. Jan. 27, 1805.

A. having a life-estate, with a power to grant building leases for 99 years, so as the best rent be reserved that can be got, for the same, &c. demises (reciting the power, and by virtue thereof and of all other powers in her vested) to B. in consideration of rent and of the surrender of a former demise by the previous tenant in fee, &c. and, at the time, the original lease and counterpart are mutually cancelled and exchanged; and upon a special verdict finding the 2d lease to be void, the best rent not being reserved; held that, although A. had a life-estate, and might have made a good demise for her life, yet the lease referring to the power, it was the intention of the parties it should operate by virtue of the power, and not out of the estate, and, as the second lease is void under the power, and does not operate according to the intention of the parties, it is no surrender of the first: held, also that the recital is not a note in writing of a substantive act of surrender under the statute of frauds; and that the act of cancelling and exchanging the indentures is not alone a good surrender, since that statute.

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BERKELEY
versus
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EJECTMENT for two messuages, &c. in the parish
of St. George, Hanover-square, in the county of
Middlesex, on the demise of Frederick Augustus, Earl

1803.

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of Berkeley, 24th December, 44 Geo. III. Plea, general issue; special verdict thereupon, Tuesday, 14th February, 1804, which finds, that the Right Honourable John Lord Berkeley of Stratton, was seised, in his demesne as of fee, of the tenements with the appurtenances, and being so seised, by indenture dated the 19th day of May, in the year of our Lord 1743, demised the same premises to one James Lumley, Esq. his executors, administrators, and assigns, for a term of 98 years; from the Annunciation of the Blessed Virgin Mary, 1741, yielding and paying unto the said John Lord Berkeley, and his assigns, for the first two years of the said term of 98 years, the yearly rent or acknowledgment of one pepper-corn only, on the last day of each year, if the same should be demanded, and yielding and paying, therefore, yearly and every year, during the term of 96 years, being the residue and remainder of the term of 98 years, unto the said John Lord Berkeley, his heirs or assigns, the yearly rent or sum of 32l. on the four most usual feast days, or time of payment of rent in the year, by even and equal portions, in clear and net money, and without any deduction, defalcation, or abatement whatsoever, from or out of the same for taxes, parliamentary or otherwise howsoever. And that the said James Lumley on the same day, executed a counterpart of the same indenture, and delivered the same to the said John Lord Berkeley, and that by virtue of the said demise, the said J. Lumley entered into the said tenements, and was possessed thereof, and that the said James Lumley afterwards assigned the said term for a valuable consideration, to the said archbishop. That the said John Lord Berkeley, on the 21st of May, 1772, being seised of the reversion of the same premises, and also seised of divers other messuages, lands, tenements, and hereditaments, in the county of Middlesex, duly made his last will and testament in writing, and thereby devised all his messuages, lands,

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tenements, and hereditaments, in the county of Middlesex, to the use of Mrs. *Anne Egerton* and her assigns; for her life, or till she should marry, with remainder to the use of the first and other sons of the said earl, successively, in tail male, with remainder to the use of the Hon. *Geo. Cranfield Berkeley*, for life, without impeachment of waste, with other remainders over. That the said *John Lord Berkeley*, by his will, gave power to the said several tenements for life to lease the same premises so to them demised, in the words following, that is to say, " And I do hereby empower the said *Anne Egerton*, Earl of *Berkeley* and *G. C. Berkeley*, when they shall respectively be in the actual possession of the said messuages, lands, tenements, and hereditaments, so devised to them for life as aforesaid, and also the guardians of the respective tenants in tail thereof, during their several minorities, by indenture or indentures, to make any demise or lease, demises, or leases, of all or any of the said messuages, lands, tenements, and hereditaments to any person or persons who shall be willing to build or repair any of the same messuages, for any term of years not exceeding 99 years, in possession, but not in reversion, or by way of future interest, so as upon every such lease or demise there be reserved, to continue due and payable during the continuance thereof, and to be incident to the remainder or reversion expectant on the determination thereof, the best and most improved yearly rent that, at the time of making thereof, can be reasonably had or gotten for the same, without taking any fine or income, or any thing in the nature or lieu of a fine or income, for or in respect of the making any such lease, and so as in every such lease there be contained the like clauses, covenants, and agreements as are usual in building or repairing leases. And that on the 14th day of May 1784, the said *Anne Egerton* being by virtue of the said demise seised for her life of the reversion

and freehold of the said tenements, with the appurtenances, in the declaration mentioned expectant on the determination of the said term, made and executed a certain indenture, dated the same day and year last aforesaid, whereby it is witnessed that for and in consideration of the surrender of the said demise and of the charges and expences which the said archbishop had been and might be at in repairing and improving the said premises, and of the rents and covenants therein reserved and continued, and thereby covenanted and agreed to be done, paid, and performed, by and on the part and behalf of the said *archbishop*, his executors, administrators, and assigns, she the said *Anne Egerton*, by virtue and in execution of the power and authority thereof, stated to be given and reserved to her in and by the last will and testament of the said *John Lord Berkeley of Stratton*, deceased, bearing date the 21st day of *May*, 1772; or any other power in the said *Anne* vested, or to her in any wise belonging, demised the same premises to the said *archbishop*, his executors, administrators, and assigns; to have and to hold the same with the appurtenances, unto the said *archbishop*, his executors, administrators, and assigns, from the feast-day of the Annunciation of the Blessed Virgin *Mary*, then last past; for and during and unto the full end and term of 99 years thence next ensuing, and fully to be complete and ended; yielding and paying therefore yearly and every year unto the said *Anne* and her assigns, during so long of the same term as she should live, and, after her decease to such person or persons to whom the same premises should belong, during the remainder of the said term, or his or their assigns respectively, the yearly rent or sum of 36l. 4s. of lawful money of Great Britain, on the four most usual feast-days or times of payment of rents in the year, by even and equal portions, in clear and net money, without making any

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deduction, defalcation, or abatement whatsoever, from or out of the same for taxes, parliamentary or otherwise howsoever, the first thereof to begin and be made at or on the feast of *St. John the Baptist*, then next ensuing the date thereof. The said archbishop accepted the said last-mentioned lease, executed a counterpart thereof, by signing and sealing the same, and at the time of the execution of the same last mentioned lease, the said first mentioned lease and the counterpart thereof, were cancelled, and exchanged, (that is to say) the original lease was cancelled and delivered, by the said archbishop to the said *Anne Egerton*, and now remains cancelled in the hands of the said earl, and the counterpart thereof was cancelled and delivered by the said *Anne Egerton* to, and now remains cancelled in the hands of the said archbishop; and that the said indenture, in the year of our Lord 1784, was not a lease warranted by the said power in the said will of the said *John Lord Berkeley of Stratton*, the rent reserved thereon not being the best that could be gotten, according to the terms of the power. In the month of May in 1803, the said *Anne* died, and that, afterwards, the said earl entered into the tenements, with the appurtenances in the said declaration mentioned, while the said archbishop was so possessed thereof as aforesaid, and from thence drove out and removed the said archbishop, and was seised thereof as the law requires, and being so seised thereof, afterwards, to wit, on the 24th of *December*, in the said declaration mentioned, demised the said premises unto the said *Richard Roe* and his assigns, &c. But whether, &c.

This case was twice argued most ably and elaborately, first in *Trinity* term last, 15th *June*, 1804, by *FREER*, for the plaintiff, and *HOLROYD* for the defendant; and a second time, Nov. 25d, 1804, by *BAYLEY*, Serjeant, for the plaintiff; and *GIBBS*, for the defendant.

For the plaintiff, on the 1st argument, it was argued to the effect following; "the right of the plaintiff to recover depends on whether the lease of 1743 is in being; for it is admitted, that the lease of 1784 is void against the remainder-man. Now the lease of 1743 is not still in being; for first, the acceptance of the lease of 1804 is a surrender of the lease of 1743; secondly, the cancelling and destroying of the deed of lease of 1743 is a destruction of the term of years created by it; and thirdly, the lease of 1784 is itself a surrender of the lease of 1743, "by deed or note in writing signed by the party," under the statute of frauds.

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First, "If lessee for life or years take a new lease of him in reversion of the same thing, this is a surrender in law of the first lease;"* "For he admits, by that, the lessor to have sufficient power to make this new lease, which he could not make without a surrender."† So also in *Ive's case*,‡ "The acceptance of a lease for years, to commence in futuro, of a manor, without excepting the trees, is a present surrender of an existing term of 30 years in the trees." And if it operate as a surrender for a part of the term, it operates for the whole; for otherwise, i. e. unless it be a present surrender, the lessor could have no right to make the new lease, which however the lessee by the acceptance admits him to have. So, here, it cannot be a surrender for the first part of the term, that is, during Mrs. E.'s life, and not a surrender for the latter part. So in *Willis v. Whitefoord*,§ "Lessee for years takes a new lease from a guardian in soccage, held, that

* *Shepherd's Touchstone*, 301. † 2 Roll. Ab. 495, l. 60.

‡ 5 Rep. 11, b. § 1 Leon. 158, 322, and 4 Leon. 7.

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the first lease is determined, though, *per Anderson*, it is no surrender, because the *guardian* has no reversion, and a lease made by him is not *void*, but *voidable* only by the infant.*" And, in this case, the lease granted by Mrs. Egerton was good against herself, for she had an estate for life, besides the power; and all the interest that she *could* pass actually passed, therefore, by this demise; and it was not only merely good by way of estoppel, but passed an interest for years, determinable on her life;† and that, notwithstanding the deed purports merely to be a conveyance under the power. That this would not prevent her interest from passing is plain, from the analogy which this bears to ecclesiastical leases, void against the successors of the lessor; with respect to which Lord Coke says,‡ "Albeit it be provided by the said acts, 1 and 13 *Eliz.* that all grants, leases, &c. made, other than leases for three lives or 21 years according to those statutes, should be *utterly void and of none effect to all intents, constructions, and purposes*, yet grants or leases not warranted by those acts are not *void*, but *good* against the lessor, if it be a sole corporation, or so long as the dean, or other head of the corporation, remain, if it be a corporation aggregate of many." On the principle above laid down in *Roll*,§ it should seem, that the acceptance of any lease void or not, in part or in whole, would in effect be a *good* surrender of a former lease; but it must be admitted, that the law now is, that the acceptance of a lease *merely*, i. e. *wholly* void, works no surrender; the reason of which is, that it is considered as a *nullity*, and the parties stand exactly as if no such transaction had taken place. But this, it should seem,

* *Bacon's Abr. Leaso*, 139. † *Co. Lit.*

.. ‡ *Co. Lit.* 45, a. § *Vide* 2 *Roll. Abr.* 495, b. *ut supra*.

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extends only to the case of a lease which is a mere nullity, as will appear from a review of the decisions. Thus in *Shepherd's Touchstone*, it is said, "the rule holdeth (of a surrender in law) albeit the second lease be voidable, as being made on a condition, or if the second lease be made by tenant in tail or the like."*

These last words, "*the like*," may well be supplied so as to apply to this case, "or tenant for life with power for leasing not strictly pursued." He cites *Whitley, W. v. Gough*,†: "If a man make a lease for years of land, and then make a *feoffment* to another of the land, and then take back an estate to him and his wife in tail of the land, and then make a new lease to the lessee for 18 years," this is a surrender in law of the first lease; and, it appears from *Dyer*, "the widow may oust the termor." This is strongly in favour of the plaintiff, for, by complying with the stat. 32 H. VIII. c. 28, the lease would have been good against the wife and issue in tail; but, at all events, it is good during the coverture, and for that reason it works a surrender, though, after the decease of the husband it becomes void. For the like reason the lease of 1784, being good during the life of Mrs. Egerton, makes a surrender. It is true that the lease in *Dyer* is only voidable by the widow, and may be confirmed by her acceptance of rent,‡ whereas this is not made good by acceptance of rent by the remainder-man; but this is not material, for the true ground is that both are at the outset good to pass an interest, and the second lease therefore implies, by necessity, a surrender of the former. This appears from *Shepherd's Touchstone*,§ who adds, that it is other-

* *Shep. Touch.* 301. The obvious distinction, here, is that the condition is in the contemplation of the party accepting the lease. EDIT.

† *Dyer*, 140.

‡ 1 *Roll.* 349

§ *Vide supra.*

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wise if it is *merely* void, and the instances he gives is *Cardinal v. Sandford*,* which was a covenant and grant for life, to the lessee, without livery, which was held a mere covenant and not a lease. What is said afterwards may appear against the plaintiff. "Also if the second lease be not a good lease, *perhaps* it shall not be construed a surrender." This was relied on in *Davison d. Bromley v. Stanley*,† but the reference to *Leac's* case,‡ explains that he uses the word good in the strictest sense, in contradistinction to merely void, 2 *Roll. Abr.* 4 cites the case of *Whitley W. v. Gough*, and confirms it by the case of *Lloyd v. Gregory*;§ and *Fulmerston v. Steward*,|| confirms strongly the same doctrine, that the second lease is a surrender of the first if it is not *merely* void *ab initio*. This latter case was not cited in *Davison v. Stanley*.** In opposition to those authorities there is, the dissent of Lord Mansfield in *Wilson v. Sir Thomas Savell*,†† but that is extrajudicial, for the court had previously decided that the second lease was good, and the reporter only adds, the court seemed to agree that if the second had been void the first lease had been good. *Davison v. Stanley*,‡‡ is similar to this case in all but one point, on which the whole turns, namely, that the second lease was by the same lessor then tenant for life, who had made the first when tenant in fee, and the lessee had no notice of the change in his estate, and on this species of fraud in the lessor, Lord Mansfield relies in his judgment. Here there is no fraud, for the power is recited, and the defendant took a chance of gaining by the acceptance of his second lease, with knowledge of the power. As to the

* *Dyer*, 272. b. + 4 *Bur.* 2210. † 2 *Rep.* 17.

§ 2 *Roll. f.* 1. 7, and *Sir W. Jones*, 405.

|| *Plow.* 102, per *Bromley, J.*

** *Ubi supra.* †† 4 *Bur.* 1975. ‡‡ *Ibid.* 2210.

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two cases of *Watt v. Maydwell*,* and *Lloyd v. Gregory*,† which were cited by the counsel for the defendant, in *Davison v. Stanley*. they were both cases of leases merely void. In the latter case the judges held, that the agreement to the second lease did not make the first void, for the second lease was never good. In *Mellows v. May*,‡ also, the second lease was held void; but yet they held it was a surrender of the first lease, according to 21 H. VII. The report of the same case in *Moore*, 686, agrees that the acceptance of the second is a surrender of the first, but does not speak so directly as to the second being a void lease. There, the acceptance of the second lease by the feme-covert is held a surrender only during coverture. But it cannot be thence inferred that the second lease here is only a surrender during the life of Mrs E.; for the law arises, in case of a feme-covert, from her peculiar disability; and if a feme, after coverture, waive an estate made by or to the baron and feme during coverture, it avoids the estate *ab initio*, Com. Dig. Baron and feme, K.; but it is not so on a lease by tenant for life. This case is of great authority, it carries the doctrine further than the plaintiff's case requires, and here the lease is not even voidable by the lessor, but determinable on her death. Thus the principle to be collected from all the cases is, that, the acceptance of a lease, by which any interest passes, is a surrender in law of a subsisting term; and the only exceptions are, where the new lease is absolutely void so that the only point here is, whether the second lease was merely void.

* Lit. Rep. 286, 279. Hutton, 104.

† Sir W. Jones, 405; and see Hargrave and Butler's Co. Lit. 45, a. note, 266. S. C. Cro. Car. 502.

‡ Cro. Eliz. 673

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On the second point he cited *Bac. Abr. tit. Leases*, 218,* and said, that though the statute of frauds, meant to substitute written for parol surrenders, yet the solemn cancellation of a writing, is a good evidence as incapable of misrepresentation, as of a surrender and a written instrument, and he cited also *Co. Lit.* 338, a. On the third point he cited and applied *Farmer v. Roger*, 2 *Roll.* 497, l. 55. 1 *Leon.* 280. *Cro. Eliz.* 488.

HOLROYD, *contra*, on the second point made as above, contended that the cancelling of the lease did not amount to a surrender; and for this purpose cited *Bolton v. the Bishop of Carlisle*† and *Gilbert's* evidence,§ which he said was in opposition to the passage cited for the plaintiff, from the same author in *Bacon's Abridgment*, "When a deed is cancelled the party cannot avoid it by pleading *non est factum*, but must plead that nothing passed by it; *Moore v. Waldron*." He cited also *Doctor Leyfield's* case,|| that a party may declare upon a bond or instrument which is lost. And he said that the statute of frauds made no alteration in the common law in this respect; for

* I presume *Ed.* 1794. On citing this passage as from Lord C. B. *Gilbert*; viz. "The cancelling the deed of lease, since the statute of frauds, is destroying the lease itself, since it is destroying the evidence of the lease;" Lord ELLENBOROUGH, C. J. said, surely that is bad reasoning—"non in titulis jus,"—I would have taken the judgment of Lord C. B. *Gilbert*, in a court, rather than his opinion in a book written, as I take it, at an earlier period of his life, and in *Leach v. Leach*, (a) the court laid down that the destruction of the deed was not the destruction of the lease itself, and that it may be set up again,

+ 2 *Wils.* 26.

† 2 *H. Bl.* 259.

§ 107.

|| 1 *Roll. Rep.* 108.

** *Rep.* 88.

(a) *Gilbert's Exchequer Reports*.

it required only that leases for more than three years should be in writing, or otherwise the demise should operate as a tenancy at will; but, being once in writing, and operating as a good demise under the statute, the destruction of the writing would not reduce it to a mere tenancy at will. He noticed the distinction between conveyances at common law and under the statute of uses as in *Co. Litt.* 237, b; and said that these leases being conveyances at common law, could not be defeated by the act of cancellation. He also cited *Woodward v. Aston*,* and *Brook's Abridgment*, tit. *Leases*, pl. 16. On the *third* point, he contended, that the mere recital of the surrender in the deed was not a good surrender in writing under the statute of frauds, for it was merely the statement of an act done which was supposed then to be a surrender, and so was different from the case of *Farmer v. Rogers*,† which contained words of surrender in *presenti*; and if this was a surrender, it must be by estoppel, whereas according to *Co. Litt.* 352, it could not so operate, because it was not reciprocal. See also *Brereton v. Evans*,‡ and *Edwards v. Rogers*.§ As to the first point, he said “whether the acceptance of the second is a surrender in law of the first lease, this lease of 1784 is absolutely void as against the remainder-man, *Doe v. Butcher*,† and, therefore, does not operate as a surrender of the lease of 1743. The principle on which the acceptance of a new *good* lease operates as a surrender of an old one, is because the tenant is by the acceptance of it estopped from saying that the lessor and his heirs had not ability to make a *good* lease for the second term; but this principle wholly fails when applied to a second void lease, for the tenant cannot

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* 1 *Ventris*, 296 † 2 *Wils.* 26. ‡ *Cro. Eliz.* 700.
§ *Sir Wm. Jones*, 450. || *Doug.* 50.
nº. 26. z

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be estopped from saying that, as against the reversioner which the reversioner himself admits by his avoiding the second lease. Here, therefore, that *estoppel* lasts as long as the tenant for life is in being, but ceases against the remainder-man; in the same manner as in *Moore, ut supra*, the second lease was a surrender only during coverture."

LAWRENCE, J. "Then you argue that, as between the *lessor* and *lessee*, it only operates by estoppel, and not by passing an interest: or must I understand you to say as between Mr. E. and the *defendant*, it operates by passing an interest?"

HOLROYD. "It operates both ways; as a good lease to pass an interest, and by estoppel, only during the life of the tenant for life. As between the *lessor* and *lessee* it passed an interest for a term determinable on the death of the *lessor*, but with respect to the remainder-man it passed no interest, but was merely void, and thus its effect is different at different times. The case of *Wilson v. Sir Thomas Sewell*,* lays down the principle clearly, and *Davidson v. Stanley*† is exactly in point; nor can the principle, as laid down in the former case, be considered as an extrajudicial opinion: all the old cases, and particularly *Lloyd v. Gregory*, were there considered. The distinction which is now set up between the case of *Davison v. Stanley*, and the present, did not prevail with the court; it was decided, not merely upon the ground of fraud, and because the lessor in the first was also the lessor in the second lease, but upon the general principle, that the ground, on which the second lease was accepted as a surrender of the first, failing, there was no consideration for the surrender, and the surrender

Ut supra.

† *Ut supra.*

was void as well as the lease. The older cases cited for the *plaintiff* are all distinguishable from the present. They are all of leases voidable, and not *merely* void. If not distinguishable from the two cases in *Burrow*, the latter authority must prevail, especially when the justice of the case concurs so strongly with them. *Meltons v. May* is reported differently in two books; *Croke* says the lease was held to be void; *More* says the lease to hold from the day of the date was good; *Lloyd and Gregory* was considered in the cases in *Burrow* as being with the *defendant*, according to the report in *Sir William Jones*, 405, as shewing that there was no surrender; and where it is mentioned in *Roll. Abr.** the distinction is taken between a void lease and a voidable one."

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FRERE, in reply, "The ground of the second lease working a surrender is not the estoppel, but the necessary presumption in law of an actual surrender of the first lease, in order to make room for the second, and which is considered as necessary to give effect to a transaction, which, having once taken effect, cannot be so wholly avoided as to repel that presumption."

LORD ELLENBOROUGH, C. J. "Lord *Mansfield* seems to consider that the second lease is not a surrender of the first, because it is a sort of contract with an implied condition, that the second lease should be a good one. We wish to have a second argument for the purpose of considering this principle, without attending to any distinction which may arise between this case and that of *Darison v. Sewell*."

GROSE, J. "I heard the argument of Mr. *Dunning* in that case; I remember the judgment, and the

* *Ut supra.*

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opinion of all who heard it was in concurrence with it. The statement of it in *Burrows* is very correct, and I thought that the law had been clearly settled by it."

On the second argument, BAYLEY, Serjeant, for the *plaintiff*, contended, that if the second lease is to operate during any part of the term and does so operate, it is a surrender; except in the single case of fraud on the part of the lessor, in prevailing on the lessee to accept it without knowledge of that which will make it void. That the true reason was given for this in *Plowden*, 107, and *Popham*, 9, viz, that the second lease and the first cannot stand together, because then the lessee would, at the same time, have a term and a reversion for a term in himself."

LORD ELLENBOROUGH, C. J. "That is only supposing the terms are not commensurate,"

BAYLEY then cited *Ive's case*, 5 Co. Rep. *Thompson v. Trafford*, *Popham*, 8. *Fulmerston v. Steward*, *Plowd.* 102, 2 Roll's Abr. 495, f. pl. 7. *Carey*, p. 29; and *Shepherd's Touchstone*, 300, and distinguished *Davison v. Stanley*, as before.

GIBBS, *contra*. "The principle of the law in the case of a surrender in law, cannot be founded upon the *merger* of one term in the other, for a longer lease is surrendered by the acceptance of a shorter; nor *estoppel*, because it is not reciprocal; nor because it is evidence of a surrender, for that ought to be found by the jury;* but the true principle must be upon the extinguishment of the one by the acceptance of the other, and then it makes no difference whether it is for a longer or a shorter term, provided the lessee takes all the

* LAWRENCE, J. said upon this, "I take it there was no surrender here, but upon the facts stated, and they are found by the jury.

interest which the second lease purports to grant; neither will it make any difference if the lease be voidable in terms, for it still grants all that it professes to convey; the lessee takes it for what it really is, and he has the whole interest till it is determined. Here if the second lease conveyed a term absolutely, or on a voidable title, it would have been a surrender: so if it conveyed in part absolutely, and in part voidable, but not if part of the term is absolutely void. But here the interest is neither absolute nor voidable, nor part absolute and part voidable, but in part absolute and in part void, absolutely or merely void. The second lease conveyed no interest except by estoppel, for no interest for the ninety-nine years passes by it except in that manner, because Mrs. E. could not controvert it during her life; and there is no case to shew that where the second lease does not grant either *absolutely* or *voidably*, that which it purports to grant, it will make a surrender. In *Roll's Abr.* 495, the distinction is taken between void and voidable leases, and he puts the case as merely void, although such a lease is good during the life of the dean,* and in *Walker v. the Dean and Chapter of Norwich*,† which is earlier than the case in *Roll*, it is so held. That case is similar to the present, that the lease was void after the death of the *dean*, by the statute; here it is avoided by the remainder-man, for want of conformity to the power. *Roll* clearly used the word *void* in the sense in which it applies to the second lease, void in part; and this supports the case of *Davison v. Stanley*, which, besides, did not proceed upon the ground of fraud, for that was mentioned only incidentally, and ought to have been a question for a court of equity, and not a court of law. When Lord

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* *Hargr. and Butl. Co. Lit.* 45, a.

† *Brownl.*

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Mansfield there used the word *void*, he used it in the sense *void for part*; and by the word *good*, he meant *good for the whole of what the lease purports*. "Whether the report of the words, used by Lord *Mansfield* in that case is correct or not, the court had all the facts before them, which are not distinguished from the present, and the judgment must have proceeded on those grounds, for all the material cases were also before them.

BAYLEY, in reply. "The cases cited from *Dyer*, 140, *Plowden*, 102, and *Carey*, 29, are none of them cases where the lessee enjoys for the whole term."

LAWRENCE, J. "But a lease by the husband as in the case in *Dyer*, is not void without entry, and would be good by acceptance of the rent, but no acceptance would confirm this lease of 1784."

BAYLEY. "But when avoided, it does not operate to pass the whole of the interest for the whole of the term, which it is argued is necessary to its working a surrender. The case in *Roll's Abr.* 495, is to be understood, where it mentions a void lease, as speaking of a lease *merely void*, for though the law now is, that a lease by a corporation aggregate is good, yet that was not always considered so. *Co. Litt.* 43, a. and notes 1 and 4, *Edit. Harg.* are to the contrary; and the distinction is there between a corporation sole and a corporation aggregate. *Lloyd and Gregory* is the case referred to by *Roll*; it is also in *Sir William Jones*, 405, and it was a case of a lease merely void; and *Cro. Car.* 502, in which it is reported more accurately, shews that it was understood as merely void, on the ground of infancy. Lord *Mansfield* also was well acquainted with the distinction between leases voidable, and leases merely void, and must be understood strictly, for the fraud on which he relied

in his judgment would make void the lease in *Davison v. Stanley*, at law.

Cur adv. vult.

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And now on Monday the 28th of *January* 1805, the judgment of the court was delivered to the following effect by LORD ELLENBOROUGH, C. J. "This is an action of ejectment for a messuage and other premises in the parish of *Saint George*, Hanover-square. The *defendant* pleaded the general issue. There was a special verdict, which states, that *John Lord Berkeley of Stratton*, was seised in his demesne as of fee of and in a certain messuage or tenement, and by indenture, dated 19th *May*, 1743, demised the same to *James Lumley* for 98 years, under a pepper-corn rent for the two first years, and 32l. a-year for the remainder of the term; that the interest of *James Lumley* came to the hands of the archbishop by assignment; that *Lord Berkeley of Stratton*, on the 1st of *May*, 1772, being so seised, made his will, and devised the estate to *Anne Egerton* for her life, or till she should marry, with remainder to the said Earl of *Berkeley*, of *Stratton*, for life, with remainder to his first and other sons successively in tail, and remainder over. The special verdict then states, that *John Lord Berkeley of Stratton* gave a power to the tenants for life to lease in the words following: "I hereby empower the said *Anne Egerton*, F. A. Earl of *Berkeley*, when they shall respectively be in the actual possession of the said messuages or tenements so devised for life as aforesaid, and also the guardians of the respective tenants in tail thereof, during their respective minorities, to them, by indentures, to make any demise or leases of all or any of the messuages or tenements to any person or persons who shall be willing to build or repair any of the same messuages, for any term of years not exceeding 99 years in possession, but not in reversion or by way of future interest; so as, upon every such lease or demise

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there be reserved to continue due and payable during the continuance thereof, and to be incident to the reversion expectant on the determination thereof, the best and most improved yearly rent that at the time of making thereof can be reasonably got for the same, without taking any fine or income or other thing in the nature or lieu of a fine or income, for or in respect of the making any new lease, and so that, in every such lease there be contained the like clauses, covenants, and agreements as are usual in building or repairing leases. The special case then goes on to state that *John Lord Berkeley, of Stratton*, died, without attesting his will; that *Anne Egerton* was seised for life, and, on the 14th of *May*, 1804, she made the lease, whereby it was witnessed that in consideration of the surrender of the first indenture, and of the expences which the archbishop had been or might be at in improving the premises, she the said *Anne, Egerton*, in execution of the power and authority given by the last will of the said earl, or of any other power and authority in her vested, or to her in any wise belonging, demised the premises in question to the said archbishop, his executors and administrators, from the feast-day of the annunciation of the Blessed Virgin *Mary* then last past, for and during the term of 99 years then next following, at and under the rent of 36l. 4s. a-year, payable on the four most usual feast-days. That the said archbishop accepted this lease and executed a counterpart; and, at the time of the last mentioned lease, the first lease, and the counterpart were cancelled and exchanged. That the original lease was delivered by the archbishop to *Mrs. Egerton*, and remained cancelled in the hands of *Lord Berkeley*. The jury found that this lease of the 14th of *May*, 1804, was not warranted by the will of *John Earl of Berkeley, of Stratton*, the rent not being the best that could be got, according to the terms of the

power. The question is, whether the *plaintiff* is entitled to recover. The jury found all the necessary matters to bring the question properly before the court.

The question, now, therefore, on this special verdict is, whether the lease of the 19th of *May*, 1743, was determined by that of the 14th of *May*, 1804? The affirmative of this proposition has been contended for, on three grounds, 1st, that the acceptance of the second lease implied the surrender of the former; secondly, that the cancelling of the lease amounts to a surrender of the term; and thirdly, that the execution of the counterpart of the lease of the 14th of *May*, 1804, is a surrender of that of the 19th of *May*, 1743, under the provisions of the statute of frauds. On the two last grounds of this proposition, the court never had the slightest doubt. For, as it is enacted by the statute of frauds, that no lease shall be surrendered or cancelled unless by deed or note in writing, the act of cancelling, which can in no allowable sense be considered as a deed or note in writing, cannot operate as a surrender. Nor can the execution of the counterpart of the second lease enure as such, unless by operation of law, for it does not purport, in terms of present operation, to be a surrender; having no words to signify the immediate intent to yield it up to *Mrs. Egerton*, but merely reciting that it is made in consideration of the surrender; which, if actually made by any substantive act or deed, ought to have been found, as a fact, by the jury, but which this recital by no means infers, for it will be sufficiently accurate if it is understood to imply, that the acceptance of the second lease is a surrender of the former lease by operation of law, provided the second lease be effectual; and in the statement of the execution of the counterpart, it is found by the jury simply that the former lease and counter-

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part were cancelled and exchanged. Indeed, this point has not been much pressed in the argument: But the material ground on which they contend, on the part of the *plaintiff*, that the acceptance of the second lease was a surrender of the first, is this, that Mrs. *Egerton*, having a life-estate, she might demise independently of the power under the will of Lord *Berkeley*, of *Stratton*, and that the lease of the 14th of *May*, 1804, being a good lease for her life, passed an interest, which was accepted, and therefore worked a surrender of the first. In support of this they cited *Co. Lit.* 45, a, where it is laid down, as to ecclesiastical leases, that though they are void against the successor, they are good against the lessor; and also *Whitley, widow, v. Gough, Dyer*, 140, b. There "the husband and wife being seised in fee, made a lease to the *defendant* for 90 years, and then enfeoffed certain persons, and took an estate to the husband and wife in tail, and then the termor took of the baron a new lease for 18 years only, to commence immediately, by parol, and then, the baron dying, the wife ousted the termor; and by the opinion of the justices, that may well be; for, the first lease was surrendered and drowned, in law, by the acceptance of the second lease."* This case, with various others, were cited to shew, that the acceptance of a *voidable* lease is a surrender, though the acceptance of a void lease is not. On the other side, they contend, that, as between the *plaintiff*, the Earl of *Berkeley*, and the *defendant*, the lease must be taken to be void *abinitio*, whatever it may be between Mrs. *Egerton* and the archbishop, for that the same instrument may at different times have different operations. And that according to the authority of *Wilson v. Sir Tho. Sewell*, 4 *Bur.* 1975, and Sir *Wm. Blackstone's* Rep.

* T. 3. *El. fo.* 200, pl. 2.

617; unless the second lease passed an interest, according to the contract of the parties to it, the acceptance of it could not be a surrender of the first. That there can be no surrender unless the second lessee takes all the interest, which is the consideration of giving up the former lease, which, in this case, the archbishop did not. They refer also to a case in 2 Roll. Ab. 495, f. pl. 7, where it laid down that "if a lessee for years of a dean and chapter, made before the stat. 13 Eliz. accepts a new lease, after the statute, for the residue of the term, by the proviso of the statute, but that lease is not good within the proviso, but merely void, this will not be any surrender of the former lease. But otherwise it is if the new lease is only voidable, and not void.*—And yet, according to the doctrine of Lord Coke, 1 Inst. 45, b. it is clearly good against the dean and chapter, while the dean or other head of the corporation remains. But we do not think the last case is an authority for such a position; for, though there is now no question that such a lease would be good, for the life of the dean, yet, according to the manuscript note of Lord Hale,† it appears that it was not always so understood. "Lease for three lives by bishop, not warranted by the statute, is not voidable against himself, but shall bind him; M. 44, 45 Eliz. C. B. D. D. n. 32, Saunders's case. And it is not void, but only voidable against the successor, for if he accepts the rent, the lease is good against him; M. 8, Car. C. B. Crook, n. 21, Owen and Ap Rees. But a lease by A. dean of B. and his chapter, not warranted by the statute, is void immediately against A. himself. Ad-

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* M. 13, Car. B. R. Fludd v. Gregory.

† Hargrave and Butler's Co. Lit. 456, 4.

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judged, because the corporation is aggregate. *M. 18 Car. B. R. Lloyd v. Gregory.*"* And in 4 *Modern*, 205, *Atkyns*, J. said, *Hunt v. Singleton*† was a hard case, considering that the dean and the chapter were all persons capable; that a grant should hold in force as long as the dean lived, and determine then." Now in *Hunt v. Singleton*, such a lease was held to be absolutely void. According to the argument used in behalf of the plaintiff, he is entitled to recover the estate in question, because the lease not having been made according to the power, which requires the greatest improved rent, it could not operate as an appointment by Mrs. *Anne Egerton* under that power in the will, and therefore, although the lease is void, it is not void in toto; for it passed the interest out of the life-estate, for so many years of the term as she should live. For this last argument, there is no authority but the passage of Lord *Coke*, where he says, that a lease by an ecclesiastical person is good during his life. That, it must be remembered, is a case of a lease which, but for the disabling statutes, would have been good for the whole term. The question did not frame itself on any defect in the instrument, but on the construction of the disabling statutes, leaving the lease to have the operation which it had prior to those statutes, or, for so long a time as it did not prejudice the rights of others. But the provision of Lord *Berkeley's* will, had not in any manner for its object to restrain the ability to demise which Mrs. *Egerton* would have had out of her life-estate; but granted a power, independent of that estate to charge the reversioner, which must be construed strictly. One of the first rules for the construction of deeds is *Verba intentioni non e contra*

* *Jones*, 405, 406.

† *Cro. Eliz.* 473, 564. 3 Co. 60.

debet inservire. See *Sheppard's Touchstone*, 186, and *Gibson v. Searl*, Cro. Jac. 176. There "the Bishop of Ely, in 26 Hen. VIII. let the manor of T. to one G. with an exception of wards, &c. for 99 years. This lease was confirmed by the dean and chapter. *Core*, Bishop of Ely, reciting this lease and the exceptions, by indenture, demises the same things excepted to the same lessee for 21 years, rendering 3s. 4d. a year, and further grants to him the bailiwick of the same manor, and constitutes him bailiff for 21 years, and grants to him all the fees and profits of the same office, which is confirmed by the dean and chapter. The sole question was, whether this grant of the bailiwick to the lessee of the manor was a surrender or determination of the first lease of the manor; and ALL THE COURT HELD, that it was not any surrender, *for that ought to be the intent of the parties*: and it appears, that it was not any intent of the parties, but that he should have a lease of the things excepted. *Whereupon*, it was doubted, whether such exception of wards, &c. be good, in case of a common person, as it is in the case of the king. But THE COURT held clearly that it is void in the case of a common person. But to take away that doubt, this lease was made *with an intendment to his benefit*, and not to his hindrance, as it should be if it should be construed to be a surrender; and therefore the law shall not make such a construction."* In *Goodtitle v. Bailey*, Cooper, 600, Lord Mansfield says "The rules laid down in respect of the construction of deeds, are founded in law, reason, and common sense, that they shall operate according to the intention of the parties if by law they may. If they cannot operate in one form, they shall operate in that which by law will effectuate their intention." And such was

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* It was also not a surrender, being of a thing excepted in the first lease.

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the law in the time of Lord Coke, as to conveyances at common law, though the same rule did not hold as to conveyances under the statute of uses, which, in many cases, it was held, did not pass any more than the parties intended. Thus it is laid down in 1 *Inst.* 49, that "where a man has two ways to pass land, and both be by the common law, and he intendeth to pass them by one of the ways, yet *ut res magis valeat*, it shall pass by the other. But where a man may pass lands, either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise.* As to whether a conveyance might operate in one of two ways under the statute of uses, it has been held that where a man intended to pass land by one way, it shall not pass by another. *Samson v. Jones*, 2 *Ventris*, 318. 3 *Levic*, 307. There "the father by deed-poll, executed only by sealing and delivery, granted a reversion to his son in fee, to the use of himself for life, remainder to his wife for life, remainder to the son in tail, remainder over; and it was held that the deed did not enure as a covenant to stand seised, because no estate passed to the son out of whose estate, according to the intent of the father, the uses must arise." So in the case of *Barrington v. Crane*, 3 *Lev.* 306, "there was a covenant to levy a fine by a father to the son to the use of the father in fee, till the son's marriage, and afterwards to the use of the son in tail, with remainders over. No

* On this passage, *Willes*, C. J. says, (*Willes' Rep.* 606,) "But that rule has not been observed for about an hundred years past; and most of the cases cited are determined contrary to that rule. Nor does Lord Coke lay it down as a general rule, but he only says, that it is so in many cases." Both *Willes*, C. J. and Lord *Ellenborough*, C. J. cited the same passage, however, to shew that the main intention of the party is to guide the construction.—*Edw.*

fine was levied, and it was held, that the uses did not arise. For it would be contrary to the intent of the parties which was to raise the use out of the fine; and, if the use arises out of the deed, it will disable the father to levy the fine, for he will have parted with all his estate by the deed." Yet there is no case or authority in the law, which says, that if a conveyance cannot operate in the way it was intended, it shall operate in another way contrary to that intent, and merely to the injury of the party who was intended to have been benefited by it. So in *Willes's Rep. 682, Roe v. Trammarr*: "A., in consideration of natural love and 100l., by deed of lease and release, granted and confirmed certain premises, after his own death, to his brother B. in tail; remainder to E. his other brother in fee: and he covenanted and granted, that the premises should, after his death, be held by B. and the heirs of his body, or by C. according to the true intent of the deed. And it was held, that this was good as a covenant to stand seised to uses, though bad as a release, being a freehold in *futuro*, and *Willes, C. J.* cited Lord C. J. *Hale's* opinion, and that of Lord *Hobart*,* that the judges ought to be curious and subtle, to invent reasons and means to make acts effectual according to the *just intent* of the parties. And that in the case of *Osman v. Sheafe*, it was said, that the judges have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it. As to *Samson v. Jones* he said, he differed from the opinion of the court in that case, because, in a covenant to stand seised to uses, the estate properly arises out of the estate of the grantor, and his intent that it should not signifies nothing. For said he though his intent is to be regarded, what estate is to pass

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* *Hob. 277.*

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and to whom, I do not think it is at all to be regarded, at to the manner of passing it, of which he is supposed to be ignorant; if it were, it would overturn almost all the cases.”*

Let us see then what it was the parties intended, and whether the *defendant* was to take an interest under the power only, or out of Mrs. *Egerton's* life-estate, in case the lease could not operate as an appointment under the power. As to this point, it is impossible to doubt. For the archbishop had 55 years unexpired of the term of 88 years, an estate of greater value than any single life. For this he could not mean to substitute a lease for his life only, and Mrs. *Egerton* professes to make this lease by virtue of the power and authority given to her by the will of Lord *Berkeley*; for she refers the act she was doing to that power, and does not shew any intention of granting an interest by way of demise as owner of the life-estate, though she uses the words, *all other powers and authorities*; for, technically speaking, the word *power*, does not apply to that sort of interest which ownership gives; 3 *Brown's Ch. Cases*, 35. The will of Lord *Berkeley* is also consistent with the same intent, for it makes the rent payable to Mrs. *Egerton* for life, and afterwards to those in remainder, and the rent on this lease is reserved to those in remainder, without any apportionate part to her executors, which would be necessary if she died between two rent days. It appears, therefore, clear what was her intention. The other

* This passage was cited to shew that the main intention of the party was to guide the construction. The reasoning of *Willes*, C. J. and of his lordship is the same in principle; though the one infers that the estate is to pass though not according to the manner of the conveyance, and the other, that not passing in the way it was expressed and intended, for 99 years, it shall not pass for the life of Mrs. *E.* [*Edit.*]

part of the question is, Did the archbishop, by executing the counterpart of the lease, surrender the former one? What he intended to accept was that which Mrs. *Egerton* could grant under the power; his object being to come in as an appointee under the power in Lord *Berkeley's* will, given to the tenants for life. And if the new lease is a surrender of the old one, it must so operate, by the archbishop's acceptance of it, being considered, as the taking a demise for ninety-nine years, determinable on the life of Mrs. *Egerton*, contrary to the expressions in the deeds, and to the disadvantage of himself, and notwithstanding he did not claim any interest which Mrs. *Egerton* could give independent of the power. In Sir *Edward Clerke's* case, 6 Co. Rep. 18, it is laid down that "if a man make a feoffment to the use of his last will, he has the use in the mean time; and, if in such case, he by his will limits estates, according to his power reserved to him on the feoffment, there the estates shall take effect, by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory; but if in such case the feoffor, by his will in writing, devises the land itself, as owner of the land, without reference to his authority, there the land shall pass by the will; for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would, and when he devised the land itself, without reference to his authority or power, he declared his intent to devise an estate as owner of the land by his will, and not to limit an use according to his authority." So here, as the lease refers to the power, and reserves rent agreeably to it, it operates out of the power and not out of the life-interest. For in *Hobart*, 159, the rules of construction on this subject are laid down most clearly: "if your act may work two ways, both arising out of your interest, election is given to the patient, as Sir *Rowland*

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Heyward's case, 37 *Eliz. Co. Lit.* 235. On the other side, if the act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest and not to the authority. And so you take it, for *fictio cedit veritati*." And he cites Sir *Edward Clerc's* case. "And lastly, where interest and authority meet, if the party declare clearly that his will is, that his act shall take effect by his authority or power, there it shall prevail against the interest, for *modus et conventio vincunt legem*; and therefore in the same case of *Clerc's*, it is agreed that, if the devisor had recited his power, and had relied upon that, all would have passed, by express declaration of the party himself."

Now the parties here have declared, most unequivocally, that this shall take effect by the authority of the power; and whether this lease would operate by estoppel, we will not inquire: it is sufficient to warrant our judgment, if it did not pass an interest, and we are of opinion it did not. In this case, our judgment is formed on this ground, that Mrs. *Egerton* having an estate independent of the power, yet intending only to demise under the power, and the archbishop, intending so to accept the demise, the deed shall not be allowed to operate contrary to their intention, and therefore passes no interest. It is not necessary therefore to examine the cases of *Wilson v. Sewell*,* or *Davidson v. Stanley*.† It may be observed, however, that the effect of our judgment will be, that the period of the Earl of *Berkeley* coming into his estate will not be postponed beyond the time contemplated by the original lessor; and the archbishop will not suffer any loss, other than what perhaps, by more skilful advice, he might have avoided. This is the justice of the case, and it would have been much to be regretted if the law had been otherwise.

JUDGMENT FOR THE DEFENDANT.

* 4 *Burr.* 1475.

† 4 *Burr.* 2210.

HUNSON *qui tam* against **SPRANGE**.—*January 23.*

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HUNSON

VERSUS

SPRANGE.

Where on a penal action on the stat. 13 Geo. II. c. 19, a part of the penalty was given to the poor, the court would not give the parties leave to compound, the overseers, at a vestry, having agreed to compound without receiving any part of the penalty.

DAMPIER moved for leave to compound a penal action, for printing hand bills and advertising a race, where the plate was under 50*l.* which, by statute 13 Geo. II. c. 19, subjects the party to a penalty of 100*l.* half to the informer, and half to the poor of the parish.

KNOX, on the part of the overseers, consented; and produced an affidavit, that the churchwardens and overseers had convened a meeting of the parish, at the vestry, for the purpose of considering the propriety of relinquishing the penalty; that there was notice given of this, at the church door, and it was agreed by the several persons there present, that they would relinquish the penalty, and that instructions should be given to their solicitor to consent.

BUT THE COURT said that they would not permit this assent to be made effectual; that the churchwardens and overseers were trustees for the parish, and they could not give up the money.

RULE REFUSED.

DARBYSHIRE and another against **PARKER**.

January 24.

Where a bill is returned for non-payment to a party residing in the country, and the post goes out so soon on that day as to render it impossible or very inconvenient to give notice to the drawer by the next post, on the same day, it may be an

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excuse for not sending notice to him by that post; but it must at any rate be sent by the next following post, and it will not be good if sent by a private hand on the next day, and it does not arrive till after the post. Whether reasonable notice or not, is a question of law upon which the jury are to determine, under the direction of the judge. "The next post" means the next convenient post.

THIS was an action against the *defendants*, as guaranties for one *Sam. Eben. Parker* for the payment of the price of certain goods delivered to him; but the sole question in the cause arose upon the point, whether due notice was given by the *plaintiffs* to *S. Parker* of the dishonour of a bill of exchange, drawn by *S. Parker* on one *Jackson* in *London*, and paid by him, *Parker*, to *Darbyshire* and Co. at *Manchester*. At the trial before LORD ELLENBOROUGH, C. J. at *Guildhall*, in the sittings after *Trinity* term, it was proved that the *defendants* undertook to guarantee the payment for the goods, which were to be paid for by a bill on *London*, at two months, which was accordingly drawn by *S. E. Parker* on *Jackson*. It became due on the 9th of *August*, 1803, and being then dishonoured, the holders in *London* transmitted notice thereof to the *plaintiffs* at *Manchester*. The post arrived at *Manchester* about midnight on the 11th, or early in the morning on the 12th, and the letters were delivered out about seven or eight in the morning. It left *Manchester* for *Liverpool*, on the same day about twelve at noon, so that there was about four or five hours time for them to write to *Parker* on that day. The post arrives at *Liverpool* from *Manchester* about seven in the evening of the same day; and, between nine and ten of the same night, that is, within a few hours, sets out again for *London*. *Darbyshire* and Co. did not write by the post on the 12th, but sent the bill by a friend on the 13th, and he accordingly gave notice to *S. E. Parker* on that

day, about nine in the evening. *Parker* being examined on the trial, said, that he received notice so late on that day, that, although he immediately wrote a letter, and ran with it to the post, he could not get it in. He said, he was much agitated with the notice of the dishonour of the bill; and there was some doubt, upon the trial, whether, if he had not been so, he might not have got the letter in the post in due time. There was no evidence that the delivery of the letters, at *Liverpool*, takes place immediately upon their arrival, so as to shew that *Parker* would have received it earlier. *Parker* had effects in the hands of *Jackson* when the bill was drawn, and also on the 13th of *August*. His lordship left it to the jury to say whether this notice was in due time; he said that it was not necessary that the *plaintiffs* should immediately on the receipt of the letter from *London* give up all other business in order to write to *Manchester*; and that, as, in *London*, the holder had till the post time on the 10th, when the bill was dishonoured on the 9th, so, by parity of reasoning, the holders at *Manchester* would have till the next day after they received the notice, to transmit notice to *Liverpool*, which would be on the 13th of *August*; and therefore this notice might be good. The jury accordingly found a verdict for the *plaintiffs*; by which they established the validity of the notice.

In *Michaelmas* term last, *GIBBS*, for the *defendant*, moved for a new trial, on the ground of a misdirection by his lordship to the jury: and contended *first*, that the notice ought to have been, by the next post after the receipt of notice by the *plaintiff*, which would be on the 12th, about noon; or *secondly*, that if notice on the 13th was sufficient, it should be sent in time for the *drawer* to write by the post of that day to the *acceptor* in *London*. A rule to shew cause was granted accordingly; and now,

ERSKINE and *RICHARDSON*, for the *plaintiffs*, shewed

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cause; and contended that the question, as to what is reasonable notice, is a question of law and of fact, and that it was for the jury to say whether, from all the circumstances, the *plaintiffs* had used due diligence in sending the letter on the 13th instead of the 12th. That although a rule had been adopted with respect to *London*, that the notice should be given by the next post, after the time when the bill is presented, yet no such rule was laid down with respect to post towns in the country; and they cited *Tindall v. Brown*,* *Mcnilman v. D'Egiano*,† and also *Haymes v. Binks*.‡ There the action was on a bill of exchange against the indorser. The bill was due on *Saturday* the 1st of *October*, and was presented, on the morning of that day, by the clerk of the *plaintiff's* banker. Payment was refused, and the bill was noted on that day. On the *Monday* the banker sent the bill to the *plaintiff*, who gave notice to the *defendant* on the *Tuesday* about noon. The *plaintiff* lived at *Knightsbridge*, and the *defendant* in *Tottenham-court-road*. The question was, whether this was a sufficient notice? Lord *Alvanley* said, that it did not appear at what time, on the *Monday*, the *plaintiff* had received notice. He was not bound to stay at home all the day, and, at the utmost, it could only be necessary that he should send by the two penny post on *Monday*, which would not deliver the letter before *Tuesday*."

Lord ELLENBOROUGH, C. J. "Reasonable diligence in giving the notice, in these cases, ought to be deemed sufficient, unless the party can shew that he has been damnified. There is indeed a general position in the books upon the subject, as in *Marius*, for instance, that the notice to the drawer, or other party, on the

* 1 Term Rep. 167, and 6 Term Rep. 186.

† 2 H. Bl. 355.

‡ 3 Bos. and Pull. 599.

bill, ought to be sent by the next post. But I am of opinion that by "*the next post*," you must understand the next reasonably convenient post; otherwise the holder of the bill would have less time to give notice in the country or to his correspondent abroad, than he would if the drawer lived in the same town. There is, however, nothing in the decided cases as a rule strictly applicable to this case. But certainly it cannot be understood, that, let the next post go out when it may, you are to send it, at all events by that conveyance. If it were so, every man must be nailed, as it were, to the post-house to open the letters immediately as they arrive, and must lay aside all other business in order to answer them, or dispatch a notice to his indorser or the drawer immediately. If indeed, there is an interval of four or five hours between the coming in and going out of the post, it may be a fit question for consideration whether the party ought or not to send by the next post. But, here, he did not send by the post of the day on which he received notice himself, nor even by the post of the next day, but by a private person, and it was not delivered till after the letters by the post. For this reason alone this case seems to deserve further consideration.

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GROSE, J. "The law seems to me to be very well ascertained in what is laid down both by Lord *Mansfield* and by Lord *Alvanley*, in the cases cited. What is reasonable notice is a question of law compounded with fact to be left to the jury. Both of them say that the notice should be by the next post, where the parties live at a distance; but it is impossible to give the notice by the next post if it goes out almost the next minute, as in some places it may do. It must therefore, mean the next convenient post by which the notice can be sent; and here, though the party might have some excuse for not sending the notice on that day, yet he ought to have used reasonable diligence.

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and ought to have sent it by the next day's post, instead of sending it by a private hand."

LAWRENCE, J. "There ought to be a new trial simply on the ground that the *plaintiff* did not send it by the post at all, and this avoids the question whether he ought to have sent the notice by the next post. When it becomes necessary to decide the general question, it will be very important to form some general rule: for it would be a great disadvantage to commerce, if every case was to depend upon its own circumstances. At present the general rule seems to be that, where the parties live in the same town, the notice should be given on the same day; where they live in distant towns, by the next post; and the language of the writers is 'by the first or next post.' Whether, however, particular circumstances may not give rise to an exception, in a particular case it would be difficult to say: but, as a general rule, I do not see the inconvenience of leaving the party who is to give the notice to shew, from the particular circumstances of his case, that he is entitled to a somewhat longer time. I certainly admit this is a question of law compounded with fact; but when the facts are found it is a mere question of law, and the jury are not to be left to decide it wholly of themselves, but are to take the directions of the judge. The case of *Metcalf v. Hall*,* and also the case in *Bull. N. P. 274, 278*, one where the jury struggled against the opinion of the judge, and the other where it was doubted whether fifteen days for notice was not allowed, were both relied on in *Tindall v. Brown*, and in that very case of *Tindall v. Brown*, the question came before the court on a special verdict, and the jury did not find any thing as to the reasonableness of the time; they only found the facts, and judgment was given in this court without more

* *Doug.* 497.

argument. But if it was necessary for the jury to say what was a reasonable time for the notice, there ought to have been a *venire de' noto*. *Willes*, C. J. in his Reports, 206, says, an issue may be joined on things which are partly matters of fact and partly matters of law; and then when the evidence is given at the trial, the judge must direct the jury how the law is, and if they find contrary to the direction of the judge, it will be sufficient cause for a new trial. And the same doctrine is laid down in the *King v. Ogilby*,* that the jury, in matters of law, must take the direction of the judge. And indeed it is so in all cases.

LE BLANC, J. "There can be no doubt but there ought to be a new trial in this case; for, whether the plaintiff was bound to give notice on the 12th, or by the post of the 13th is not material; he has done neither, but has sent it on the 13th by a private person, who arrived after the post. What is a reasonable time is a question of law on which the jury is to receive the direction of the judge. If that be so, and by the general rule of law it is to be understood that the notice should be sent by the next post, then it will be for the other side to shew that the circumstances were such that the plaintiff could not send it by the next post, as that he was so engaged in other affairs, or that he was ill, and could not write immediately upon the receipt of the letter; and this being found by the jury may raise a question. I do not, however, consider that it is a question in all cases to be left to the jury entirely; for I think it is better that, as nearly as possible, a general rule should be laid down all over the kingdom; otherwise you would have one rule in London and another in Bristol, which would be very inconvenient. Such a rule being adopted, the distance from

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* Lord Raym.

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the post, the impossibility of sending by the next post, or the situation of the parties at the time, may form an exception.

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Afterwards, on the 2d of March, 1805, this cause was tried again before Lord ELLENBOROUGH, C. J. at *Guildhall*, when a verdict was had for the *plaintiff*, under the direction of his lordship, it being proved that the letter was delivered by the private conveyance as early as it would have been delivered by the post had it been sent on the 13th.

HOPKINSON against GIBSON.—January 24.

Where a colonel had purchased horses for government, and they being approved of by the proper inspecting officer, were sent under the care of a serjeant to the receiving depot for his majesty's use, held, that the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the serjeant, as a distress for a turnpike-toll.

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TROVER for a horse tried at *Guildford* summer assizes, before *Runninton* serjeant, to try a right to demand toll at the turnpike-gate, on the *Kent* road, for certain horses which were sent by the *plaintiff* to *Woolwich*, as it was said, for the service of his majesty, and which therefore, it was contended, were, by the last *mutiny act*, exempted from toll. The facts were as follows: Colonel *Hopkinson*, the *plaintiff*, was employed by the Ordinance Board to purchase horses for the *Royal Hospital Artillery* at *Woolwich*. On the 15th of *October*, 1803, he purchased ten horses of a dealer, which were taken to *Privy Gardens*, there to be approved of by the officer of the Board of Ordinance for government. Colonel *Hopkinson* then ordered the

horses to be taken by some artillerymen under the conduct of one *Harriots*, a serjeant or corporal, to *Woolwich*. Upon coming to the gate, the man was stopped, and one of his horses was taken, by way of a distress for the toll, he not being prepared to pay it. He shewed the turnpike man his *roll*. He then proceeded to *Woolwich*, where he delivered the rest of the horses to one Colonel *Close*, and obtained of him a note to demand the horse which had been seized. The gate-keeper refused to deliver it, saying, that it was taken in order to try the right. At the trial, the taking the horse as a distress was admitted. The only question was to try the fact, whether they were the horses of government or in the service of his majesty, in either of which cases they would be exempt from toll by the 55th section of the mutiny act for the year 1803. On the part of the *defendant*, GARROW called no evidence, but contended, that either the horses were not the property of his majesty, or in the employment of government, or that, if they were, Colonel *Hopkinson* had no property in the horse in question, so as to entitle him to maintain an action of trover in his own name. The learned judge told the jury they were bound to find a verdict for the *plaintiff*, if the horses were in the employment of government; if otherwise, they must find it for the *defendant*. The jury accordingly found a verdict for the *plaintiff*, 29l.; and at the same time the learned judge reserved the point :

GARROW, last term, moved for a new trial on the above grounds; and a rule to shew cause was granted: whereupon,

SHEPHERD, Serjeant, and MORRIS, E. for the *plaintiff*, shewed cause, and contended that the horse in question was in the service of his majesty, although it might happen to be returned at *Woolwich*, if it should

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not be approved of there. That in order to be taken into the service of government it was necessary the horse should be passed in this manner by Colonel *Hopkinson* to the officer at *Woolwich*; and that the case of such a horse was very different from one sent down by the dealer at a venture to be received or not at *Woolwich* as it might happen. That Colonel *Hopkinson* had a special property in the horse, which he had not parted with when he delivered it to *Harriots*, and this entitled him to bring trover.

LORD ELLENBOROUGH, C. J. "How can you make out a special property in Colonel *Hopkinson*? The property is in the crown. Colonel *Hopkinson* was merely an agent. He advanced the money for the purchase of the horse, for government merely. He might have an indictment for the crown, or there may be an action of trover perhaps brought by the person who had the actual custody of the horse at the time. He may now, as far as we know, have filed an indictment."

MORRIS then urged that Colonel *Hopkinson* was liable over to the crown for any gross negligence, with respect to the horse, as if he had delivered it to the care of *Harriots*, when he was in a state of intoxication and obviously unfit to have the care of it, and had then lost it, and so he might be considered as a bailee who had a property in the horse sufficient to maintain trover.

LORD ELLENBOROUGH, C. J. "You can never make him a bailee. You cannot make my servant, whose possession is my possession, my bailee. He is not liable as a bailee. Where goods are delivered to another as a bailee, the special property passes to him; but here it does not. He is merely the servant of government. I am, however, extremely sorry that this objection should have been taken. It is a case in

which there is no difficulty. The action is brought by a person who has no property in the horse."

LAWRENCE, J. "There can be no doubt that Colonel *Hopkinson* would be liable to government in case of gross negligence just as your servant is answerable to you. If the action had been brought in trespass, I do not know, but he might maintain it."

RULE ABSOLUTE; New trial granted.

RICHARDSON against SEWELL.—January 25.

Where a declaration stated an undertaking to carry safely certain goods by water, with an exception of all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of the seas, rivers, and navigation of what nature or kind soever, held, that this exception being beyond the common law exception, must be specially proved.

THIS was an action against a carrier by water, upon a special undertaking, for negligence in not taking due care of goods entrusted to him. The declaration stated a special contract to carry safely with the exception of "all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of the seas, rivers, and navigation of what nature or kind soever." At the trial before *Graham, B.* at *Carlisle*, the plaintiff proved the delivery of the goods to the value of fifty pounds at the defendant's vessel to be carried, and it appeared they were lost. The defendant's counsel objected that the contract stated in the declaration should be proved by producing the bill of lading or by some evidence to shew this express exception to have been made by the defendant. The learned judge thought that it might be inferred from the usage of trade; but there was no particular evidence given of such usage. The jury found a verdict for the plaintiff; whereupon *Cockell* ser-

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jeant, in last term, obtained a rule to shew cause why there should not be a new trial.

PARKE and WOOD now shewed cause, and endeavoured shortly to shew that the exception stated contained nothing but that which is excepted by implication of law. That "*fire*," since the stat. 26 Geo. III. c. 86, may be considered as excepted, for under that act, the owner of a ship is only liable for damage in certain cases and to a certain amount; that "all other accidents whatsoever, in this exception," must mean all accidents *ejusdem generis*; that carriers by sea differed in some measure from carriers by land, for they were not liable to robbery at sea, though they were in rivers; that perils and dangers of the sea are excepted in *Molloy*, 230, and that the latter clause of this exception amounted to no more. And they referred to 12 *Modern*, 684, *Laine v. Sir Robert Cotton*.

LORD ELLENBOROUGH, C. J. "Is there any difference between a carrier by land and by sea, except that at sea the acts of God, which give rise to the accidents excepted, are multiplied beyond those on land, and therefore, many things at sea are excepted against which cannot happen by land? But neither fire nor some other of the accidents here stated are excepted at common law. Even running against a vessel is an accident of navigation within the *terms* of this exception. It is clear it was intended to provide against negligence. It is framed upon the exception which grew out of the case of *Shepherd v. Smith*, reported in *Mr. Abbott's Law of Shipping*. That was a case of negligence; the ship, being on a bank, slipped down, and the goods got wet. That was in a river; but yet it was a danger of navigation. This exception ought to have been proved."

RULE ABSOLUTE for a new trial, the learned judge not having reserved the point for a nonsuit.

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ANONYMOUS — *Affidavit to hold to bail.*—January 25. ANONYMOUS.

Where an affidavit to hold to bail stated the deponent to reside at a certain place, which was not the true place of his abode, according to the rule of court; held, that it was not informal, so as to warrant the proceedings to be set aside, or the defendant to be discharged, upon common bail.

ESPINASSE moved to set aside proceedings or discharge the defendant, upon filing common bail, for a defect in the affidavit. The affidavit stated a place of abode of the plaintiff, but was not true in point of fact. This, he contended, was not within the rule of court, for it was as if no place of abode was stated.

BY THE COURT. "The affidavit is not informal. It is by much too strict, in point of formality. If you have any objection to it, you must indict the party for perjury. We should otherwise have an issue upon almost every affidavit, whether the party is properly described or not."

RULE NISI REFUSED.

NEWSON against THORNTON and Another—Jan. 24.

Where goods from abroad are consigned to a factor to sell under a bill of lading, though he may indorse the bill of lading to a vendee, yet he cannot assign it merely as a pledge. The merchant who takes the indorsement of a bill of lading should require to see the letter in which it was sent, and look to the title which the indorser has, whether as factor or vendee.

ON shewing cause against a rule to shew cause why there should not be a new trial in this case, it appeared, that this was an action of *trover*, brought for 20 barrels of beef and 20 barrels of pork. Upon the trial before Lord ELLENBOROUGH, C. J. at Guildhall, in

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the sittings after *Trinity* term, 1804, the *plaintiff* proved the original property in himself; that a bill of lading was made out of the beef in *May*, 1803, and afterwards another of pork from Ireland, "to one Capt. *Church* or his assigns." The pork was shipped also to his order, and he, Captain *Church*, was jointly interested in it. *Church*, being embarrassed in his affairs, went to *Ireland*, and had previously raised money to the amount of about 200*l.* on the beef, of the *defendants*, the *Thorn-tons*, and had indorsed to them the bills of lading. Before he went to *Ireland*, he had agreed with them for some further advances to be made to him upon the bills of lading of the pork. His clerk accordingly took the bill of lading to the *defendants*, but they did not make the advances. The usual credit upon provisions shipped from *Ireland* is a bill at three months, and three months discount, and the shipper usually draws for the amount at 90 days' date. From the date of the bill of lading it would therefore appear that the goods were not paid for, when the bill of lading was indorsed to the *defendants*. The *plaintiff* proved a demand on one *Nolan*, the Captain of the ship in which the barrels of pork were laden, before they were delivered to the *Thorntons*, and also on the *defendants*, Messrs. *Thorntons*; and a tender was made, by the consignee, of all charges, and first of 100*l.* and then of 200*l.*; but they detained it as security for other money due to them. As to the beef, therefore, it appeared, that the consignee had, by indorsing the bill of lading, pledged it with the *Thorntons* as a security for certain advances made to him; as to the pork, it appeared that the bill of lading was indorsed to them on account of money to be advanced by them, but which they had not advanced according to their agreement; and, as Lord ELLENBOROUGH, C. J. said, no consideration passed between them and the consignee, for the pork. At the trial, it was contended, for the *defendants*, that the indorse-

ment of the bill of lading to the *Thorntons* passed the interest in the *beef* and *pork* to them, and that the *plaintiff* could neither stop it in *transitu*, nor now claim it. The *plaintiff's* counsel contended, that the indorsement of the bill of lading could transfer no other right to the consignee, *Church*, and to the *defendants*, than the actual delivery of the goods would transfer to them. That *Church*, as to the *beef*, was only the factor of the *plaintiff*, and though he might sell it, yet could not pawn it; that as to the *pork* no consideration passed between *Church* and the *Thorntons*, and therefore they could not claim it. A verdict, under the direction of his lordship, was had for the *plaintiff*, for the value of the whole quantity of *beef* and *pork*, and not for the moiety only belonging to *Newson*.

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GIBBS, PARK, and MARRYAT shewed cause, and said "the assignment by *Church* to the *Thorntons* was not *bonâ fide*; and there was a breach of faith on the part of the latter, as to the *pork*, in obtaining the indorsement of the bills of lading, without advancing the money which they had promised. This not being done, the *pork* remained in their hands as the property of the persons who had deposited it with them. The *plaintiff* demanded it of the *captain* before it was delivered out of the ship, and by this stoppage in *transitu* no right vested in *Church* as to the part share of *Newson*. The indorsement of the bill of lading being also in the same month, it would be presumed that the goods were not paid for. But be that as it may, yet the goods being in his, *Church's* hands, as a factor, he could not pledge them for money to be advanced to him. It is said, however, that the holding of a bill of lading may give a better title to a third person, than to a factor who has the possession of the goods. But that, upon principle, cannot be so; for a bill of lading is

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nothing more than an order which conveys a right to have the goods delivered, and there is nothing in the books, or in the case of *Lickbarrow v. Mason*,* to warrant such a position; for that was a question of stoppage *in transitu* between the vendor and the vendee. And it is clear that the possession of a bill of lading cannot give a factor a greater power over the goods than he would have without a bill of lading, because in case of foreign goods, he can never be put in possession of them without a bill of lading. Even between vendor and vendee, in this case, the indorsement of the bill of lading would only pass the goods, subject to the vendor's right of stopping *in transitu*, because the bill of lading must convey to the indorsee a knowledge that the goods were not paid for, and therefore were liable to such stoppage. *Salomons v. Nissen*.† As to the pork, *Church* derived no right himself, because the plaintiff stopped it *in transitu*, and the defendant, could in no view of the case make any title to it, because he had not advanced any thing for it as the consideration for the indorsement of the bill. As to the beef, he only pledged it. The expences were tendered to the captain before the delivery. In the case of a consignment by a bill of lading, the indorsee has the means of knowing what the right of the indorser is, because it is always sent with a letter or an invoice, and he may require to see it." They cited and referred to *Patterson v. Tash*,‡ which they said was the case of a factor; to *Daubeny v. Duval*,§ where the goods had got into the hands of a third person; and also to *Wright v. Campbell*.||

* 6 Term Rep. 131. § Term Rep. 683. 2 Term Rep. 63.

† 2 Term Rep. 674.

‡ 2 Str. 1178.

§ 5 Term Rep. 604.

|| 4 Burr. 2046.

ERSKINE, *contrà*. "The indorsement of the bill of lading, as to the beef, was *bona fide* in consideration of 200l. to be advanced, and which was accordingly advanced. *Wright v. Campbell*, which was cited for the *plaintiff*, is evidently a case as between principal and factor, and though the court decided against the indorsee of the bill of lading, on the ground of fraud, yet where there is no fraud, as there is none in this case, it is a decision in favour of the *defendant*; for, under the fraud, it agrees exactly with this case. A bill of lading must be negotiable, as it was held in *Lickbarrow v. Mason*, or else a buyer under a buyer could have no better title than the original buyer of the goods. When *Lickbarrow v. Mason* was sent down for a second trial, *Hunter v. Baring* stood next before it, and that was a case of principal and factor.* *Lickbarrow v. Mason* was decided in this court upon the ground that by the custom of merchants a bill of lading may be indorsed, and the whole reasoning of the judges in this court tends to shew, that if it is capable of indorsement, it must pass like a bill of exchange, and it must follow, from these cases, that, if the party who sends the bill of lading does not, at the same time, describe in it in what character the cognizee is to receive the goods, whether as vendee or factor, he is enabled to borrow money upon them or dispose of them as he pleases."

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Lord ELLENBOROUGH, C. J. "As to the pork it was deposited with the *defendants* upon a promise which was not performed; the only material question, therefore, is with respect to the beef. I should be

* Upon being asked by the court whether the factor had only pledged the goods, in that case, ERSKINE would not undertake to state the case to have been so.

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extremely sorry, if any thing which fell from me in this case should affect the right of assigning a bill of lading. Although *Wright v. Campbell* was on the assignment of a bill of lading given to a factor, yet it was an assignment made upon a sale by the factor. As to the beef, then it is rightly stated that I considered it as a pledge; and the question is, whether, when a bill of lading is assigned as a pledge, by a factor, it shall pass the property to the assignee or not? Now I consider it as if the goods had arrived at hand, and then if the factor having the goods had sold them, the property would have passed to his vendee; if the sale was *bonafide*; but he could not pledge the goods. This is a *symbol* of the right to the possession, and it ought not to be made the means of fraud upon any one. If the party has the visible possession of the goods, that is such an evidence of property as induces the party who purchases to give credit to him. In deciding for the *plaintiff*, in this case, I do not break in upon any of the decisions as to the right of transferring a bill of lading; I consider the bill of lading when the goods arrive as an irrevocable, unalienable, uncontrollable assignment of the goods, to a vendee; but here it is not treated as an absolute assignment: the goods are sent to *Church* as a factor and he does not sell them but makes a deposit of the bill of lading as a mere pledge."

GROSS, J. "It seems absurd that a bill of lading should confer on the possessor a greater right of property than the actual delivery of the goods. In all the cases which have been referred to, it seems that it has been presumed that the delivery of the goods themselves would have passed the property; but it is impossible to contend that the assignment of the bill of lading could transfer the property more effectually, than the actual delivery of the goods; and then it comes to the

short question, whether the *defendants* shall keep the goods if they are delivered to them as a pledge?"

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LAWRENCE, J. " I am of the same opinion. The case is now reduced to the question upon the beef. That question is, whether a factor who could not dispose of the goods, in the manner in which he has here disposed of the bill of lading, could so dispose of that bill of lading, which is only an authority to receive the goods. *Wright v. Campbell*, has been a great deal relied upon; but the answer to it is, that, there, the court did not consider the question which is now made, as to the power of the factor to pawn a bill of lading, but merely whether the sale was *bona fide*, and whether it was a fraud or not. But now it is said that the bill of lading, unless restrained in its terms, is an instrument which conveys a transferrable right of property, like a bill of exchange. But in the case of *Lickbarrow v. Mason*, as it went before the court of *Exchequer chamber*, a great deal was said to shew that it could not be an absolute transfer of the property, in like manner as a bill of exchange. It may operate as an instrument, which is evidence of the transfer of the property, somewhat like a lease, which is the evidence of the transferring of the property in a house. A bill of lading is evidence of the sale, but it is still liable to a stoppage *in transitu*, before the goods are delivered by the captain; and I cannot understand what can be meant by an absolute transfer of the property which is liable to be divested by stoppage *in transitu*. That stoppage must be made before he parts with the goods, and when by the bill of lading they have got into the hands of a third person fairly, they become his property, and you cannot stop them; but you can, if there has no consideration passed for the goods, and the assignment of the bill of lading. Here the consignee had the title to the goods only as a factor, and could not pledge them, Nor do I see any incon-

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venience in requiring the party to look to the title of one who offers to indorse a bill of lading; for, why cannot a merchant say, "Let me look at your letter of advice; at your invoice; let me see how you have acquired this bill of lading; whether you hold it as a factor or as a vendee?" Here the defendants have neglected to do so, they take a bad title without looking into it, and they ought to suffer by it."

LE BLANC, J. expressed himself of the same opinion, and said, "In the case of *Lickbarrow v. Mason*, general expressions as to the assignment of bills of lading are made use of, but we must understand those expressions only as applicable to the subject then before the court, and that was a case of an indorsement made, not by a factor, but by a vendee. The case of *Wright v. Campbell*, may indeed appear like a case of a factor pledging the goods of his principal; but, looking at the decision of the court, it will be seen that they looked upon it merely as a sale, and there is in reality no reason to infer whether or not the court considered the goods as pledged; although upon examining the case it may appear that the fact really was so; and we must not carry, either this case or the case of *Lickbarrow v. Mason* to affect cases which were not then within the contemplation of the court."

RULE DISCHARGED; new trial refused.

LAWRENCE against SIDEBOTHAM.

On a policy of insurance, with or without letter of marque, and liberty to chase, capture, and man, "the assured cannot delay, on the voyage, merely for the purpose of conveying the prize into a port of condemnation; neither is such a liberty to be inferred from the instructions and articles given with the letter of marque, "to carry into port, &c." Semble, It is no deviation to delay for the purpose of giving assistance to a ship in distress.

THIS was an action upon a policy of insurance on the ship in the *African* trade. The policy was "with or without letter of marque," and "with liberty to chase, capture, and man." The ship having arrived on the coast of *Africa*, and having taken in a cargo of slaves, came to anchor in the river *Congo*, about six miles from an enemy's ship called *La Brave*; at about ten in the morning they slipped their cables and sailed after the *La Brave*, which, after a chase of about 30 miles, they captured. After this, the captain, having manned his prize, proceeded on the trading voyage, and went to the *westward* to the port of destination in the *West Indies*, with the prize in company. In the course of the voyage the prize sailed slower than the other ship. On the 22d of *October*, the *La Brave* was almost out of sight, in the stern of the *captor*.

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On the 25th. the *captor* shortened sail, in order to keep in company with the *La Brave*. On the 26th, at eleven at night they did the same. The *captain* deposed in his evidence, that he did not do this for his own safety, but in order to protect the captured ship. His own ship afterwards sprung a leak, and was lost, but the captain had not apprehended any danger till the sixth of *November*, when the vessel was sinking: the captain removed the crew and their cloaths into the *La Brave*. The instruction from the owners were, that the captain should take under his protection any ship that he should capture. This cause was tried before Lord ELLENBOROUGH, C. J. at *Guildhall* sittings after *Trinity* term, 1804; and a verdict was had for the *plaintiff*. Several objections were made at the trial, and it was first contended that the ship was not seaworthy. The defence was afterwards placed solely on the question of deviation; and it was urged, that there was a deviation, first, when the ship chased and captured the *La Brave*; secondly, when she shortened sail and waited for the *La Brave*. His lordship left

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the two questions to the jury, first, whether the ship was seaworthy at sailing; and next as to the *letter of marque*; and said that the words of the policy, "with liberty to chase, capture, and man," imported a latitude of license, which, though difficult to explain, the captain had not exceeded. He, however, gave the *defendant* liberty to move for a nonsuit. A motion was made in the last term for a rule to shew cause, which being granted, cause was now shewn by ERSKINE, PARK, TOPPING, and WOOD, for the *plaintiff*; and they contended, that a *letter of marque* is always accompanied with instructions from the *Admiralty*, that the ship having the *letter of marque* shall set upon, pursue, and take all vessels belonging to the enemy, and send the captured ship to the nearest port to some court of *admiralty*, where she may be condemned; and, after she is brought in, the prize-master must send three or four of the crew of the captured ship, of whom one must be the master, supercargo, or boatswain, and this the parties are bound in a penalty to comply with. That the captor in this case, being a slave ship, which could not safely spare so many of her best hands, it was necessary she should accompany the *La Brave*, in order for their mutual protection. [LAWRENCE, J. here observed that the evidence of the captain was expressly "that he did not keep company with the prize for his own protection"] That there was no actual deviation out of the course for the *West Indies*, after the capture, except by the shortening sail. That to hold this to be a deviation would deprive every ship which should happen to be insured, from affording the common offices of humanity to any vessel in distress.

COCKELL, Serj. and LITLEDALE, for the *defendant*.
"The captain was bound to proceed to the *West Indies*, not only by the shortest course, but with all possible dispatch. The commission with the *letter of marque*

and the articles, may be complied with, by sending a sufficient number of persons from the ship making the capture to conduct the captured vessel into port. Though the object of the voyage is hostile capture, as well as mercantile adventure, yet the party ought to take out a sufficient quantity of men for both purposes. The liberty to chase, capture, and man must, like all other express licenses, be construed strictly, and it imports only that the prize ship is to be secured to the captor, by being *manned*, and not by the captor becoming a *convoy* to her. Here was a delay unnecessary for the purposes of the voyage insured, which is a deviation, for it alters the nature of the voyage and of the risk.

LORD ELLENBOROUGH, C. J. "The question is, whether the acting as a convoy in this case, in order to make the captured ship conform to the orders of the capturing ship, and to bring her safe into a port for condemnation is within the license of this policy. Liberties of this sort without restricting them to nice constructions upon the strict terms of them, yet cannot be extended beyond their fair import. As to the words, "with or without letters of *marque*," I shall not pronounce an opinion upon them, as the question is now fairly before the court, in the case of *Parr v. Anderson*. Although it should be admitted that the liberty to take a letter of *marque* does empower the insured to do all which is contained in the instructions, yet it does not follow, that the captor is personally to accompany the prize, in his own ship, into a port; it may be understood only as requiring that the captor should man his prize sufficiently, and send her into port, with certain officers on board, and a certain number of the captured crew. Neither does this seem warranted by the terms of the policy; for, in this case, *expressio unius est*

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omissio alterius, and a liberty to chase, capture, and man is not, therefore, a liberty to *convoy*. Indeed if it were so there would not be any necessity for the liberty to man the prize. As to the giving assistance to each that will not authorize any loitering in the course of other, voyage for any other purposes; and the loitering on the 26th of *October* was not for the sake of such assistance; for the leak was not sprung till the 6th of *Nov*. Indeed, that point does not arise; but when it does, it may be found for the benefit of all underwriters to allow of those mutual assistances which humanity dictates, and without which ships in distress could never be saved. It appears here there has been a deviation.

GROSE, J. "The question is, whether this ship has done that which is within the liberty in the policy, "to chase, capture, and man." That liberty is confined to the words "chase, capture, and man," and does not include the words "to accompany, the captured ship, or to convey her into a port of condemnation;" and if that had been the intention of the underwriters, it would, probably, have been expressed in particular words. As to the argument that the captor must, under the articles and the letter of marque, carry her into port, that may mean that she is to bring her into port, by properly manning the prize. Then it is said the insured continued their voyage for their destined port: but have they or not increased the dangers of the risk by their conduct? Now the captain states, that, on this and the other day, he shortened sail. This seems neither within the words of the liberty, nor within the intention of the parties. If this had been their intention, they would have said "with liberty, not only to chase, capture, and man, but also to convoy into port."

LAWRENCE, J. "I am of the same opinion. What the captain has said is true, that he did not wait for the

La Brave for his own protection; for under the instructions he received from his owners, he was to attend upon and convoy his prize. It has been argued, that it is absolutely necessary, under the letter of *marque*, to convoy the ship into a port; but that argument is fallacious, in considering it as absolutely necessary; for the prize may be sent into port properly manned; and, when a ship goes out on a double adventure, as this is, the insured ought to have a sufficient crew for both purposes. If this is not absolutely necessary, under the letter of *marque*, then it comes to this question, whether, under a liberty of this kind, the assured can reduce the crew to a dangerous extent by manning the prize so that she is obliged to keep her company, and loiter beyond her proper time of performing her voyage, for the purpose of protecting her. I should feel very great difficulty in saying, that, if a ship should be in danger, another ship which was insured should not stop to assist her. Indeed, if it be a deviation to stop, for the purpose of assistance in distress, I do not understand what can be or not a deviation. But that necessity did not occur in this case, for, though the prize once carried away her top-mast, that is a very slight and ordinary accident, and she repaired it without assistance."

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LE BLANC J. "This is not a case in which the two ships were accompanying each other, for the sake of mutual assistance, for neither stood in want of it; and this case is therefore very different from that of a ship which either accompanies another, or slackens sail, for the purpose of giving assistance in distress. It is, on the contrary, the case of a merchantman actually loitering on the voyage, and not using that dispatch in coming to her port, which she ought to have done. If she had done nothing more than see the captured vessel into a place of greater safety, than that where she was

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captured, it might perhaps have been considered with-
in the liberty to capture; but this was done in pursu-
ance of instructions from the owners, that the captain
should take under his protection all ships that he should
capture. Is that then necessarily implied in the terms
of the policy, which authorises him "to chase, capture,
and man;" that was satisfied when he had chased,
captured, and manned; but it is neither in the terms of
the policy, nor of the letter of *marque*, and the instruc-
tions with it, that he should *convoy*. When once it
was proved, that the ship delayed and slackened her
course, it was incumbent on the *plaintiff* to shew a
clear ground for loitering on the voyage; but he has
not shewn any ground, for it was done without any
necessity, at the time, to give assistance. In this case,
therefore, without saying any thing upon the construc-
tion which may be put upon these words, in any other
case, where such necessity may arise, I think this is a
deviation."

RULE DISCHARGED.

CLEMENTS and wife against KEEN.

*Semble, an extra excise man is entitled to notice under the
excise laws, on actions brought against him for any thing
done in pursuance of any of the excise laws; or at least, he
is entitled to it, as a person acting under an excise officer,
if he is sent to make a search in a boat coming on shore,
though no excise officer appointed by warrant from the board
be present.*

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THIS was an action of trespass for an assault, com-
mitted by the *defendant* on the wife of *Clements*;
which was tried before Lord ELLENBOROUGH, C. J.
at the last summer assizes at *Exeter*. The assault com-
plained of was committed in the course of a search
made on board a boat in which the *plaintiff*, *Clements*,

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and his wife, and some others were coming on shore, The *defendant* and some other persons were sent by the regular excise-officer to search the boat. He did not accompany them, because he was afraid of being known. He sent them out, and they brought back some spirits, which they had seized. In the course of the search it was said that *Keen* acted with indecency to the wife of *Clements*, whom he suspected to carry spirits, in a bladder, concealed about her person. The surveyor of excise being called, stated as above, that he employed the *defendant* as an *extra* man. He was paid 50l. a year the same as a regular excise man, but he was not appointed by the board of excise. His name was transmitted to the board of excise for them to issue his pay, but the surveyor of excise could turn him away at his pleasure. The counsel for the *defendant* then insisted that, as a person acting in pursuance of some one of the excise laws, he was entitled to have notice before the action brought under the 28 Geo. III. c. 37, s. 23, and it was said that it might be collected from the 5th section what was the construction of the 23d section of this statute, and that it applies to all persons acting under excise officers, the words being, "no action shall be brought against any excise officer or officers or any person acting under him or them, until, &c." On the other side, it was contended that the *defendant* not being an excise officer had no power under any of the statutes relating to excise to make the original search in this case,* and that the protection, under these acts, was intended to be afforded only to those persons who were either excise officers strictly, or who were acting under and in the presence of a regular excise officer. That neither the surveyor of excise, nor any other regular officer, being in the boat when the search was made, the search

* GASELER cited, for this purpose, 36 Geo. III. c. 40.

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was not legal so as to afford a justification to this man, or to entitle him to notice in the present action; and that if he had any authority, under the excise laws, he had exceeded it, and had by that means deprived himself of all protection under them, for he was not then acting in *pursuance* of any excise laws. His lordship, thought that this *defendant* was either an excise officer or that he was acting under an excise officer, and said, that to require that the surveyor or excise officer should go personally on all occasions to make the search would be as it appeared from this case, to impede the execution of those laws; for it was obvious that, if the person of the excise officer was always to be known to the parties in the boat, it would afford them an opportunity of secreting the goods or of preparing for defence and violence. He therefore directed a nonsuit.

In *Michaelmas* term last, GAZELEE, for the *plaintiff*, moved for a new trial on the above grounds; and a rule to shew cause being granted,

DALLAS and GIBBS, for the *defendant*, shewed cause, and the former stated the objections taken at the trial as follows; *first*, that no notice of the action was given; and *secondly*, that the action was not brought within time. That in answer to the objection that this *defendant* was not an excise officer, not being appointed by a general warrant from the commissioners, he was in fact a person employed by one having authority to employ him, and was employed in the business of the excise, and there is no other description or definition of an excise officer than "one employed in the business of excise," and officers who have a temporary duty as well as those persons who have a permanent duty, and who are empowered by a warrant, are equally excise officers. And as to the excess of authority, if a man having such authority means fairly to act under

it, and does a little exceed his authority, he still is within the protection of the acts of parliament requiring notice.

LAWRENCE, J. "Otherwise it must follow that he will never be entitled to notice except in cases where he does not want it."

LORD ELLENBOROUGH, C. J. "It was meant that these persons should have a protection, so far as the notice goes, to give them an opportunity of making amends where they have acted rather illegally."

LE BLANC, J. asked, whether all officers properly appointed by the excise are not required to take the oaths under the statute 12. of Car. II. But the court now, and on the motion, having expressed a strong opinion against the *plaintiff* on one or other of the points, and chiefly that whether an excise officer or not, he was entitled to notice as acting in pursuance of some excise law, The counsel for the *plaintiff* gave up the point upon the *defendant's* agreeing to give up the treble costs.

RULE DISCHARGED.

On granting the rule his lordship said, "we assume it to be understood that the *defendant* is an excise officer in every respect except, that he is not appointed by the board of excise by a warrant or deputation."

MOSES PATIENCE against A. TOWNLEY.

A bill drawn on Leghorn was not presented in due time, owing to the political state of the country at that time, which rendered it impossible to present it; Held, that it being afterwards presented for payment with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties; and evidence of

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this impossibility of presenting at the time of the maturity of the bill might be given, on the ordinary averment that it was duly presented.

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THIS was an action on a bill of exchange by the holder against one of the antecedent parties thereon. It was drawn on the 1st of *June*, 1800, at three months usance on *Leghorn*, and was due on the 10th, of *September*, 1800, but was not presented either for acceptance or payment until the 31st of *October*, 1800. The protest stated that it was not paid because not presented in due time. At the trial before LORD ELLENBOROUGH, C. J. at *Guildhall*, at the sittings after last term, this was relied upon as a defence to the action; but the *plaintiff* proved, that, from the particular situation of the country, *Leghorn* being then occupied by the enemy, or in some such critical situation, though the bill was sent out by the *plaintiff* for the purpose of being presented, it was impossible to present it in due time, and was presented as early as could be afterwards, and there was a verdict for the *plaintiff*.

ERSKINE now moved for a new trial, on the ground that it should have been stated in the declaration that the presenting of the bill for acceptance and payment was delayed and prevented by the special circumstances of the case as above; and that evidence of the impossibility of presenting it, in due time, could not be given under the ordinary averment in this case that the bill was duly presented. But by

LORD ELLENBOROUGH, C. J. “ *Duly presented* is presented according to the custom of merchants, which necessarily implies an exception in favour of those unaxoidable accidents which must prevent the party from doing it within the regular time; and it was left to the jury to say, whether from the situation of the country it was possible for the *plaintiff* to present it in due time”

RULE NISI REFUSED.

NORTHWICK against STANTON.

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In assumpsit for a fine on admission to a copyhold, where the lord remitted a part of the fine, held, that it was not necessary to prove an entry on the court-rolls, either of the original assessment of the fine, or the reassessment; for the lord and not the homage, is to assess the fine.

THIS was an action of assumpsit to recover a sum due for a fine, on an admission to a copyhold, which was tried before Lord ELLENBOROUGH, C. J. at the sittings at Westminster, after last Michaelmas term, and wherein there was a verdict for the plaintiff.

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WIGLEY now moved for a new trial; and stated that the action was in assumpsit, and the declaration stated generally that the defendant being a copyhold tenant of the plaintiff, lord of the manor of Harrow, was indebted to the plaintiff, as lord of the manor, for certain sums due, as fines for admission to divers copyhold tenements; with a count for 100l. due, and payable in respect of admission to divers copyhold tenements, &c. At the trial the rolls were produced, whereon it appeared that the defendant was admitted on the 7th of August, 1801; the value of the land was proved, and also the entry of the defendant, as tenant to the premises in question at and under the yearly rent of one shilling, and the customs and services. The lord of the manor then assessed 100l. as a fine, but out of his grace and favour remitted 40l. On the part of the defendant, it was contended that 60l. was too large a fine, for the premises were not worth 80l. per ann. and that there was no entry of the fine nor of the assessment, or reassessment thereof, on the court rolls of the manor. On the 30th of January, 1804, the steward of the manor wrote a letter to the defendant as follows, "Madam, as steward of the manor of Harrow, I hereby give you

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notice, if you do not within a week pay, or cause to be paid, the sum of 40*l.* as a reassessed fine for your admission, I shall be under the necessity of bringing an action against you." Yet there was no entry on the rolls of this letter, or of any fine whatever, and it was insisted at the trial that there ought to have been such entry of a reassessment on the court rolls, but that the letter was merely a notice, and not a reassessment. And **ERSKINE** now contended that there was good reason why this reassessment should appear upon the rolls, for by that means the amount of the fine would appear, and the title of the copyholder would be clearer, and the value be the more easily ascertained, since the value of a copyhold estate depends much upon the amount of the fine.

LORD ELLENBOROUGH, C. J. "You do not say that there is any authority for this being put upon the court-rolls, and there is a very good reason why it should not appear; for it is the practice of the *lord*, from mercy and other reasons, to remit the fine, and it might then be very inconvenient for him to have it stated on the court-rolls in order to conclude himself on another admission.

LAWRENCE, J. "The court-rolls are the records of the finding of the homage. Now the lord assesses the fine, and it is no part of the duty of the homage to do it. The homage say what is the rent; and that being done, the steward informs them what is the fine."

GROSE, J. "I have seen many entries in court-rolls, and the usual mode is to state the presentment and admission, and then an entry is made thus; "after which, at the said court, a fine is paid with which the lord is content."

RULE NISI REFUSED.

Moss and Others against MILLS and Another.

1805.

February 6.

Held, that an indorsement of a bill of sale of a ship on the transfer of property therein is not valid within the registry acts, made on a register which is cancelled and void, even though it was so cancelled in consequence of obtaining a former register de novo which was invalid.

Semble, the indorsement should be made at the time of making the bill of sale, or in a reasonable time after, and should state the true date of the bill of sale, and will not be good where the indorsement is dated on one day and the bill of sale subsequently.

THIS was an action of trover to recover the value of a ship called the *Samaritan's Hope*; the defendants pleaded the general issue. The cause came on to be tried at the last summer assizes for the county of *Lancaster*, when the jury found a verdict for the plaintiffs for 1750*l.* subject to the opinion of the court on the following case. *Tho. Twamlow* and *Sam. Mc Dowal* residing at *Liverpool*, and being the owners of the ship in question, by bill of sale, dated the 6th of July, 1799, assigned to and transferred the said ship, then belonging to and lying in the port of *Liverpool*, for a valuable consideration, to *John Kirkpatrick*, then also resident in *Liverpool*. In the above bill of sale a certificate of registry *de novo* of the said ship, in the names of the said *Tho. Twamlow*, and *Sam. Mc Dowal*, at the said port of *Liverpool*, was duly and accurately recited. This certificate of registry *de novo* is No. 135, and dated at *Liverpool* the 17th of July, 1799, and has the following memorandum written upon it; viz. the former register granted at *Scarboro'*, No. 13, dated the 3d of April, 1793, having been taken away by the enemy, this vessel is permitted to be registered

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de novo, by order from the honourable the commissioners of his majesty's customs; No. 379, dated the 4th of July, 1799. An *indorsement* appears upon the said certificate of registry in the words following, viz. *Liverpool, be it remembered that we, Tho. Twamlow and Sam. Mc. Dowal, both of Liverpool, in the county of Lancaster, merchants, have this day sold and transferred all our right, share, or interest in and to the ship and vessel the Samaritan's Hope, mentioned in the within certificate of registry, unto John Kirkpatrick, of Liverpool aforesaid, merchant; witness our hands this 29th of July, in the year 1799, signed in the presence of us, &c. But the said indorsement on the said certificate of registry was not signed on the said 29th of July, 1799, by the said Thomas Twamlow and Sam. Mc. Dowal, or either of them, or any other person authorized by him or either of them in that behalf, nor was such indorsement signed by the said Tho. Twamlow and Sam. Mc. Dowal until and upon the 24th of June, 1802, as above mentioned. On the 29th of July, 1799, the said John Kirkpatrick caused the said ship to be registered, at the port of Liverpool, in his own name, when the certificate of the registry before mentioned, granted to the said Tho. Twamlow and Sam. Mc. Dowal, was delivered up and cancelled, and the same was produced at the trial by a clerk from the proper custody at the custom-house, London, and the said John Kirkpatrick obtained the following certificate of registry (that is to say), "in pursuance of an act passed in the 26th year of King Geo. III. entitled, an act for the further increase and encouragement of shipping and navigation, John Kirkpatrick, of Liverpool, in the county of Lancaster, merchant, having taken and subscribed the oath required by this act, and having sworn that he is sole owner of the ship or vessel called the Samaritan's Hope, of Liverpool, whereof Brezes*

Smith is at present master, and that the said ship or vessel was built at *Scarboro*, in the county of *York*, in the year 1793, the former register granted at *Liverpool*, No. 136, dated the 17th of July, 1799, delivered up and cancelled; and *William Scales*, tide surveyor, and *Wm. Yeates, Jun.* having certified to us that the said ship or vessel is British built, has two decks and three masts; that the length from the fore part of the main stern to the after part of the stern post aloft is 83 feet; breadth at the broadest part above the main wales 24 feet 7 inches; her height below decks in the steerage 5 feet 7 inches; and admeasures 205 tons; that she is a square sterned ship, has no gallery and a bilet-head: and the said subscribing owner having consented and agreed to the above description and admeasurement, and having given sufficient security as is required by the said act, the said ship *Samaritan's Hope* has been duly registered at the port of *Liverpool*. Given under our hands and seals of office at the custom-house in the said port of *Liverpool*, this 29th of July, in the year 1799, *A. Anslon*, Collector, *E. Rigby*, Comptroller. Under all, some, or one of the above mentioned documents, the said *John Kirkpatrick* took possession of the said ship, and exercised acts of ownership upon the same in respect thereof. In February, 1800, the said *John Kirkpatrick*, by bill of sale, which recited the said certificate of registry granted unto the said *Thos. Twamlow* and *Sam. Mc. Dowal*, assigned and transferred the said ship for the considerations in the same bill of sale mentioned to *Gavin Young* and *I. Glennie*, who then resided in London. The said *G. Young* and *I. Glennie*, in August 1800, by a bill of sale, assigned and transferred the said ship, for a valuable consideration, to *Wm. Hamilton* and *Michael Peter Touray*, then also residing in London; and in February 1801, the said *Hamilton* and *Michael Peter Touray*, by bill of sale, in consideration of 1800*l.* actually paid by the said *James*

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Mills, the defendant assigned and transferred the said ship to the said *James Mills*, then and still resident in *London*; but no indorsement was made on any certificate of registry, in respect of either the said bill of sale from the said *John Kirkpatrick* to *Gavin Young* and *John Glennie*, or of that from the said *Gavin Young* and *John Glennie* to *Wm. Hamilton*, and *Michael Peter Touray*, or of that from the said *Wm. Hamilton* and *Michael Peter Touray* to the said *James Mills*; nor was any copy of the said three last mentioned bills of sale delivered, or any other of the requisites of the register acts complied with, in respect of the three last mentioned bills of sale. Immediately after the said last mentioned bill of sale, the defendant, *James Mills*, took possession of the said ship, and has continued in such possession ever since. The bill of sale from the said *Tho. Twamlow* and *Sam. Mc. Dowal* to *John Kirkpatrick*, of the 6th of July, 1799, is now in the possession of the said *James Mills*, and has been so ever since February 1801. In November 1800, the said *John Kirkpatrick* became a bankrupt, and a commission of bankrupt issued against him, and his estate and effects were, under such commission, duly assigned to the plaintiffs and the said *John Parr*, deceased. On the 14th of August, 1802, the said *John Kirkpatrick* obtained his certificate, under the said commission of bankrupt. The indorsement made as before mentioned on the said certificate of registry, granted to the said *Tho. Twamlow* and *Sam. Mc. Dowal*, and dated the 29th of July, 1799, was signed by them the said *Tho. Twamlow* and *Sam. Mc. Dowal*, in the presence of two witnesses, upon the 24th day of June, 1802, and not before. After the last mentioned day, the plaintiffs demanded the ship in question of the defendants, in whose possession she then was, but the defendants refused to deliver her, and converted her to their own use. The question for the opinion of the

court is, whether the *plaintiffs* are entitled to recover? and if the court shall be of opinion that they are so entitled, then the present verdict to stand; if otherwise, a nonsuit to be entered: either party to be at liberty to turn this case unto a special verdict, if they should wish to bring a writ of error.

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Moss
and Others
versus
Mills
and Another.

This case was first argued in Michaelmas term last November 20th, 1804, by LITLEDALE for the *plaintiffs*, and HULLOCK for the *defendants*.

For the *plaintiffs* it was contended that the bill of sale to the *defendants* not being duly registered, they derived no title under the registry act; but, that with respect to the *plaintiffs*, their title was complete although the certificate of registry was not indorsed on the day when it bears date; for that, according to the case of *Moss v. Charnock*,* it is sufficient, where the rights of third persons are not affected, if the indorsement is made in a reasonable time.

LE BLANC, J. "But this indorsement was upon a cancelled instrument, and that varies the case from *Moss v. Charnock*.

"If the register *de novo* was improperly granted, the commissioners could not strictly cancel the instrument; and if it could be considered as cancelled by the parties themselves, they, by indorsing the deed, have now set it up again. It never can be considered as wholly cancelled, for, if so, it would be the means of destroying the evidences of title to the greater part of the shipping in all the ports in the kingdom; and in 19 cases out of 20 where a register *de novo* is granted, it is done irregularly. Although it is cancelled in form; yet still it is not wholly destroyed, and the title is not affected by it, as in the case of a cancelled deed.

* 2 East, 399.

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 Moss
 and Others
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 Mills
 and Another.

LAWRENCE, J. "There is no question, but that if a title is once vested in any person, by means of a deed, the cancelling it does not divest the estate though it creates some difficulty in respect of the means of proving the title."

For the *defendant*, it was contended, that though the *defendants* could not make out a formal title, yet neither could the *plaintiffs*, and that, at the time of granting the certificate *de novo*, neither the *plaintiffs* nor *Kirkpatrick* the bankrupt had any title either legal or equitable. (Lord ELLENBOROUGH, C. J. observed, that he did not suppose it would be contended that they had.) Then if the court are of opinion that no title accrued to *Kirkpatrick* on the register *de novo*, so as the indorsement on the registry was not executed within a reasonable time after the execution of the bill of sale, that would not communicate a title under the registry act, for it was not executed till three years after the bill of sale. And though the registry acts do not point out, in this case, the precise time when the indorsement shall be made, yet it was plainly the intent of the legislature that it should be within a reasonable time;* and it is a question of law what is a reasonable time. Now the statute 7 and 8 W. III. c. 22, which requires an indorsement, states no particular time for making it, but it ought to be done immediately, or otherwise the notice it affords to the public will be of little avail. But the question here is not so much whether the indorsement was made in due time, but whether or not an indorsement upon this instrument, which is a mere nullity, is a regular indorsement under the acts for registering ships. The act in question requires that the indorsement should be made in the manner thereafter expressed, and then requires, that it shall be signed by

* *Cappadoce v. Codner*, 1 Bos. and Pul. 486.

some of the parties conveying an interest, or some person legally authorised by them, and a copy of such indorsement shall be delivered to the person authorised to make registry. "Now this is all imperative on the parties; and the proper officer to give this notice and copy to is the officer at *Liverpool*, and not at *London*, unless a register *de novo* is good; and though the officer at *Liverpool* would have been bound to transmit it to *London*, yet it is now in *London* not as an instrument regularly transmitted from *Liverpool* under the act, but as an improperly granted instrument and copy. It ought indeed to have remained at *Liverpool*, and the officer there ought to have transmitted a copy to *London*, *Heath v. Hubbard*.* The plaintiffs have, therefore, no right to recover in this action, because the indorsement was not signed within a reasonable time after the execution of the bill of sale; and because by that very delay, the ship might, in the mean time, have been assigned to foreigners as owners." He then referred to the recital in the 26 G. III. c. 60. s. 16, and the 34 G. III. c. 68. s. 16, and also s. 17, from which he said, it appeared that it should be done immediately; for, in providing for the case of an owner residing abroad, it is said, "where the owner resides in a foreign country, so that the indorsement cannot be made immediately;" which implies that, where there is nothing to prevent it, the indorsement should be made immediately.

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—
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and Others
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MILLS
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[Lord ELLENBOROUGH, C. J. "Is there not a provision that where the ship is not in port at the time, it shall be registered in ten days after her arrival; how then can we say that three years is a reasonable time, where no such difficulty occurs?"]

Moss v. Charnock does not affect this case, for it only

* 4 East, 110.

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decides that it should be done within a reasonable time, or immediately.

LAWRENCE, J. "All that was decided in that case was merely this, that where there was no time fixed by the act of parliament for doing a certain act, it should not, when done, have any relation back.

HULLOCK. "Neither have the cases as to cancelled instruments any bearing upon this question." This is a case where an act of parliament requires an indorsement on a particular instrument; and this is an indorsement on a cancelled and void instrument, and therefore is not within the terms of the act of parliament."

LITLEDALE, in reply, contended that it was not necessary the indorsement should be made immediately or within any definite time, for the act was silent in that respect; but where a definite time was requisite within the spirit of the acts, there a precise time was specified.

Lord ELLENBOROUGH, C. J. "Can this indorsement be good which not only states an untrue fact, viz. 'On this day sold and transferred,' &c, but is dated on one day, and was executed at a subsequent day? Now this indorsement refers the inquirer to an instrument executed that day, and whether it is meant to refer to this instrument or not, yet it refers to that which has not then the effect of an assignment. It is true, that deeds executed after they bear date are good, but in those cases the truth is not required to be stated by act of parliament. The form of the instrument is 'this day transferred,' and also on an indorsement on the transfer of a ship at sea, it states truly when the transfer is made, as thus, 'and now at this day, being ten days after the return of such a ship.' Surely, therefore, the act should be pursued by complying with these provisions, and then the truth will be all stated. Great difficulties would be avoided if all was done at as nearly as possible the same time, and where there is so much

difficulty in finding the spirit of the act, we had better adhere strictly to the letter." [His lordship made these observations in reply to an argument from *Littledale*, that the form in the 16th section would necessarily lead to the stating of a falsehood on the face of the certificate, by referring to a transfer made "on this day," which yet, from circumstances, must appear to be made ten days before.]

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and Others
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LITTLEDALE. "The order of the commissioners in *London* bore date the 6th, but the register was not made till the 17th, and they would not alter the date of the bill of sale, though in fact it was not executed till the 17th.

The court then required a second argument, and *LE BLANC*, J. recommended it to be stated, if possible, whether at the time of making the bill of sale in question, the register or certificate actually existed.

On the second argument, THE COURT put the question *in limine* to *HOLROYD*, whether, as the indorsement was made on a register that was perfectly cancelled, he could, in a case where the law was strict, say that it was a proper indorsement? To which he could only answer that, if the indorsement could not be completed after the register was cancelled, it could never, by any means, in case of an improper register *de novo*, where the register was cancelled, be again properly registered; and that the officer had no power to cancel it, and should not have delivered it up till the other register was made.

LORD ELLENBOROUGH, C. J. "This is a case *strictissimi juris*, and these are difficulties which we cannot provide against; but we must, I repeat, be obliged to decide according to the letter of the act, where the spirit of it is so difficult to be ascertained."

GROSE, J. "This indorsement has never answered to give the public notice of the transfer of the property,

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and Others
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and it is no better than if it was done upon a blank piece of paper."

LAWRENCE, J. "On the last argument it was said the cancelling of an instrument does not destroy the interest which passes by it. This is true if the interest is vested under it; but these acts require the interest to be passed by indorsement on a certain instrument. This is an indorsement on such an instrument which is cancelled, and which is null and void under the act. It is too a most unrighteous action on the part of the bankrupt."

JUDGMENT FOR THE DEFENDANT.

DOE on the demise of GEORGE and wife against JESSON.

Where the ancestor died seised leaving a son and daughter infants, and the son, still an infant, went abroad, and there, as was found by the jury, died under age; held that the daughter, under the statute of limitations, had only 10 years after her coming of age, or 20 years after the death of the ancestor to bring an ejectment.

Doe dem.
George and
Wife
versus
JESSON.

THIS was an *ejectment* tried at Northampton, summer assizes, 1804, before ROOKE, J. At the trial it was proved, that one *Thomas Jesson* received the rent of the premises in 1776, which was held sufficient seisin, and died in 1777. He had a son, *John Jesson*, who was baptized in 1767, and also a daughter, one of the lessors of the *plaintiff* who was baptized in 1771, both infants at the time of *Thomas Jesson's* death. This *John Jesson* went abroad in 1778, still being an infant, and never returned. The learned judge directed the jury to presume that he was dead, and to fix a period when they supposed him to die, which, with some difficulty, they fixed at between 7 and 10 years after he

went abroad, and not before, he then being an infant. And upon this supposition a question arose, whether the person last seised, *John Jesson*, dying under disability, his sister had 10 years after her coming of age or 20 years after his death, under the statute of limitations, in which to bring her ejectment. The jury found a verdict for the *plaintiff*, under the direction of the learned judge, in order to take the opinion of the court upon this point, and also upon another question, upon the will of *Edward Jesson*, the father of *Thomas Jesson*, wherein this land was devised to him, and whether that devise was for *life* or *in fee*.

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DOR DEM.
GEORGE and
Wife
VERSUS
JESSON

CLARK, N. G. for the *defendant*, obtained a rule to shew cause, in last *Michaelmas* term, why there should not be a new trial; and, now, cause was shewn by VAUGHAN, serjeant, who, after reading the statute 21 Jac. 1. c. 16, s. 1, 3, and 4, admitted that if the statute ran from the time when the person died who was last seised, then the present action would be too late. And he said that the difficulty arose from the jury being pressed to say when *John Jesson* died. If they had found that he died within the last 10 years, which they might very well have done, then the action would be within time; for though the title of *John Jesson* would have accrued more than 20 years, yet he had been under a continued disability during all the time. He therefore contended that the lessor of the *plaintiff* had 20 years during which to bring her action, after her brother's death.

LORD ELLENBOROUGH, C. J. "It is clear the sister, though an infant, could not have 20 years after the brother's death, but only 10 years after she came of age herself. If it were not so, and an infant heir had a child at 18, and died under age, it might go on to the end of time, a new disability growing out of a former one, and the right would never be barred."

LAWRENCE, J. "The right must have descended on

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**Doe dem.
George and
Wife
versus
Jesson.**

John Jesson and then, he being an infant, his heir, who is also an infant, has 10 years after her disability is removed, that is to say, after she comes of age. The lessor of the *plaintiff* has not claimed within 10 years, and she is now barred. In *Plowden*, there is a case on the statute of fines, in which great difficulty occurred from the wording of that statute; but in order to avoid the like inconvenience, the word *death* is omitted in a similar passage in the statute of limitations, and the time runs from the day when the title accrued."

RULE ABSOLUTE.

The court being clear on this point, the other question was not agitated.

WOOD against HARVEY.—January 26.

Upon an order of justices, under 42 Geo. II. c. 90, s. 41; and 43 Geo. III. c. 82, s. 44, against a master to pay 5l. to his servant, who was enrolled in the army of reserve, held, that after notice of the order, and 21 days elapsed, and the order confirmed upon appeal to the quarter sessions, the sum might be levied by a warrant of distress, without shewing a demand by the servant or militia man, &c. after the determination of the appeal.

**WOOD
versus
HARVEY.**

THIS was an action of *trespass* tried at Maidstone last summer assizes, before Runnington, Serj. for levying 5l. on a warrant of distress under the militia and army of reserve acts, 42 *Geo. III.* c. 90, s. 41; and 43 *Geo. III.* c. 82, s. 44; verdict for the *plaintiff* for 5l. damages, subject to a question reserved by the learned judge, whether it was necessary to prove a demand and refusal of the money mentioned in the distress warrant; which he had been of opinion was not necessary. A rule having been obtained to shew cause why there should not be a nonsuit entered,

SHEPHERD, Serjeant, and **MARRYAT**, for the *defendant*, stated that the *plaintiff's* servant had been drawn

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WOOD
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for the army of reserve ; and by the first of the above acts, " If any servant shall be enrolled as a militia man, it shall not alter his engagement with his master unless the militia is *embodied*," and with respect to the settlement of disputes concerning wages, &c. it is enacted, " that where any dispute shall arise touching any sum of money due, &c. it shall be lawful for such justices, &c. to examine any such master or masters, touching the same, and to make such order as may seem fit ; and in case of refusal by 21 days next after such determination, such justices may issue a warrant of distress of the same on the goods and chattels of such master or masters," &c. This provision is by the latter statute incorporated also into that act. The *plaintiff's* servant had been drawn for the army of reserve, and the *defendant*, upon complaint made to him, ordered 5l. to be paid to him by the *plaintiff*. He appealed from this order to the sessions, and they confirmed the order. Whereupon, a warrant of distress was issued by the *defendant*, in which warrant the original order was stated, and also that " on the 10th day of *August* last," the said *Thomas* had notice *thereof*, and did not pay, &c. ; but no complaint was stated to have been made to the justices subsequent to the appeal. When the appeal was determined, the servant was gone to join his regiment ; and the mother of the servant, and also the constable, before he executed the warrant, demanded the money, but *Wood* said he would not pay *them*. There was no evidence that he objected to pay, because they had no authority to receive it, only that he refused to pay them ; but the objection was taken at the trial, that no demand and refusal was proved after the confirming of the order by the quarter sessions ; and it was therefore insisted that the warrant of distress was illegal.

GARROW and LAWES, for the *plaintiff*, contended, that upon the general law of the land the *plaintiff*

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should have had notice of the confirmation of the order, and a demand and refusal should have been proved thereon. And they cited *Coarc v. Callaway*,* as to a demand and refusal, after a previous tender, which demand was only made by the clerk to the *plaintiff's* attorney, and therefore held insufficient.

BY THE COURT. "It is essential to the jurisdiction of the magistrate, that the party should not have paid the money during the 21 days, or that there should be a demand and absolute refusal, but there are no words strictly requiring a demand. The original order was in *August*, and the appeal was confirmed on the 7th of *October*, and it was not pretended at that time that the money was paid. The money becomes due by the original order, 21 days after which, a warrant might have issued; but the payment is suspended, *ex gratia*, by the appeal: and then the moment the appeal is determined the money ought to be paid, and it is the master's business to find out the party and tender him the money.

LAWRENCE, J. in giving his opinion, had some difficulty, from supposing that the levy was made under the original warrant, and not on a second warrant made after the appeal; but, this being explained, he concurred fully in opinion with the rest of the court.

The PLAINTIFF was therefore NONSUITED,
the warrant and distress being legal.

ANONYMOUS.—CONVICTION.

Where upon a conviction on the stat. 29 Geo. II. c. 33. s. 7, an appeal is allowed to the sessions, upon giving eight days notice, held, that it is only necessary to give notice to the prosecutor, &c. and not to the overseers of the parish, although part of the penalty is given to the poor of the parish.

* 1 *Espinasse*, 115.

THIS was a motion, I presume, for a mandamus to the quarter sessions to enter and hear an appeal to a conviction founded on the stat. 29 Geo. II. c. 33, s. 3 & 7, for regulating the woollen manufacture. This act contains certain provisions for settling the wages, and enacts, *inter alia*, that no master shall pay his workmen in any thing but money, and, if he pays in goods or any thing else than money, imposes a penalty of 20l. one half to the informer, and the other to the poor of the parish, to be recovered in a summary way before a justice of the peace. And "upon giving eight days' notice to the party or parties in whose favour such order hath been made," an appeal is allowed to the quarter sessions. In this case notice was given to the party, but it was contended before the sessions that notice ought to be given also to the parish officers. The court of quarter sessions held it a good objection. It was now sworn that *Stephens* the attorney, for the prosecutor, was also agent and attorney for the court of guardians of the poor; but it was contended that this was not sufficient, for they were not the overseers of the parish of *St. Gregory*, where the offence was committed.

1805.

ANONYMOUS.

Lord ELLENBOROUGH, C.J. "Suppose, that part of the penalty is given to the *king*, is it necessary to give notice of appeal to the *Attorney-General*?"

MARRVATT, in support of the conviction. "The poor of the parish have nothing to do with the conviction; they have only an interest in the money after it is levied.

THE COURT, as it should seem from my note, which is somewhat defective in not stating how the point came before the court, held, that notice to the churchwardens and overseers was not necessary, and made

THE RULE ABSOLUTE.

1805.

The KING against the late Sheriff of *Middlesex*; **SMITH** and others against **WHITE**.—28th of January, 1805.

Where the defendant was rendered in discharge of bail, and the defendant's attorney called to give notice of render that night, but finding no one in the way saw the plaintiff's attorney the next morning, and then gave notice: held, that an attachment against the sheriff moved for on that day, although the instructions to the counsel were given before the notice, was irregular, and the attachment accordingly set aside.

The KING
versus
the late Sheriff
of MIDDLESEX.

BARROW having obtained a rule to shew cause why the attachment, against the sheriff for not bringing in the body in this case, should not be set aside.

ESPINASSE shewed cause, and stated that the writ, in the cause, was returnable on the 7th Nov. 1804, and there was a rule to return the writ on the 6th, which was complied with on the 11th. The proceedings were then stayed by a motion to set aside the writ for irregularity, which was discharged. On the 21st there was a rule to bring in the body, which expired on the 26th of *November*, and on the same night the principal was rendered; and the *defendant's* attorney called at the house of the *plaintiff's* attorney, to serve the notice of render, but nobody was at home. He called again the next morning at 10 o'clock, and gave personal notice of the render to the *plaintiff's* attorney.

As to the first irregularity, he contended that it was waved by the sheriff's returning the writ. As to the second, he admitted the notice of render on the morning of the 27th, but he said that a brief to move for the attachment was actually delivered to counsel over night, and it was moved for, within two hours of the sitting of the court, so that the notice was too late;

besides which there was no *committitur* in the marshal's book.

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ANONYMOUS.
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BARROW, *2 contra*, as to the want of the *committitur*, cited 2 *Burr.* 1049; and *Watson v. Sutton*, 1 *Salk.* 272.

BY THE COURT. "The *plaintiff's* attorney should not have moved for the attachment after he had notice of the render. The *marshal's* book is only for the convenience of the parties.

RULE ABSOLUTE, with costs.*

INGRAM against FORSTER.—January 27th.

Query. Whether when a bill is left for acceptance, and the drawer, after its remaining in his possession 24 hours, requires time to consider of it, and the holder grants him that time, the holder is not bound to give immediate notice to his indorser of the particular circumstance of such request and of the delay granted; although he is not bound to present the bill for acceptance.

THIS was an action of *assumpsit*; plea, general issue and set off; tried at York last summer assizes before CHAMBER, J. The *plaintiffs* were bankers at Wakefield; the *defendant* kept cash with them, and the action was brought to recover the balance of their account. The only question was, whether the *plaintiffs* were entitled to debit the *defendant* with a bill of exchange, for 619l. 15s. 6d. which had been paid into their hands, and when presented for payment was dishonoured. At the trial, the bill was admitted; but an objection was taken that the *plaintiffs* did not give the *defendant* notice of some delay in the acceptance.

INGRAM
and Another
versus
FORSTER.

* See relatione T. BARROW; and also from my own notes.

1805.

INGRAM
and Another
versus
FOSTER.

The bill was drawn the 15th of *March*, 1803, on a house in *London*, and was presented by *Strange* and Co. the *plaintiffs'* bankers and agents, for acceptance, on the 18th of *April*. Their clerk did not call for the bill the next day, but on the 20th; when the drawee desired it to be left another day; and on the 21st of *April* it was returned to *Strange* and Co. unaccepted, and they sent notice immediately to the *plaintiffs*; who likewise gave notice to the *defendant*, but without stating the particular circumstances of the presenting of the bill. It was afterwards returned in due time for non-payment. Notice was given, as was said, by *Kennett*, one of the *plaintiffs*, to the *defendant* in person, but as evidence could not be had of this, the proof of the notice of non-payment was as follows: a letter was sent from the *plaintiff* to the *defendant*, on the 30th of *May*, 1803, by a servant; he saw the *defendant*, and delivered the letter to him; he said it related to a bill; it was what he expected; he had notice of it *the week before* from the *plaintiff* Mr. *Kennett*. But he did not mention on what day. The notice to the *plaintiffs* being sent on the 18th would have arrived on the 21st of *May*, which was *Saturday*, and *Monday* was the 23d. The *defendant* lived at *Horbury*, eight miles from the *plaintiffs*. The learned judge thought that as this evidence did not carry the notice back earlier than the 23d, it was not sufficient, and accordingly nonsuited the *plaintiffs*. There was another objection also taken as to the notice of non-acceptance: viz. that the drawer ought to have given his answer, whether he could accept or not, on the 2d, day when the clerk of *Strange* and Co. called for the bill, and the giving a day's further time was at their hazard; and the *defendant* ought then to have had notice, as upon an absolute refusal. The learned judge, said that he recollected no instance of the rule having been held so strictly; and the counsel not quoting any authority, and the *defendants* not.

being bound to present for acceptance at all, he over-ruled this exception.

PARKE having obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial granted,

TOPPING and HOLROYD now shewed cause, and contended that there ought to have been notice of the delay in the acceptance or non-acceptance on the 19th of *April*. They cited *Marius*, edit. 3d, p. 61, where he says, "No three days for acceptance," and also another paragraph entitled, "24 hours for acceptance," and contended that from the whole of those passages, it was clear that they applied to inland as well as to foreign bills, and that the party presenting ought to demand an answer whether the bill will be accepted or not within 24 hours."

PARKE, *contra*, as to this point, said that the passage in *Marius* was not applicable to the present case, because it did not appear but that it might be meant only of bills drawn at so many days after sight.

The COURT held, that, at least, the evidence of the notice of non-payment should have been left to the jury, and that therefore there should be a new trial.

On the other point, Lord ELLENBOROUGH, C. J. observed that the law of merchants at *Hamburgh*, and which prevails all over the continent of *Europe*, is, that when a bill is kept more than 24 hours after acceptance, it amounts to an acceptance; and he should wish this point to be settled, and that it should be inquired, whether, when bills are left for acceptance, there is not a specific time when they should be returned; and whether, if the holder allows further time, he should not inform his indorser, and put him in as good a situation as himself?

RULE ABSOLUTE.

1805

INGRAM
and Another
versus
FOSTER.

1805.

COLE against GOWER.—January 29.

Overseers of the poor should proceed to take an indemnity, in cases of bastardy, from the putative father, under the statute 6 Geo. II. c. 31, s. 1, and cannot commute the same for a specific sum; and all notes and all other securities given for payment of money absolutely, in such case, are, in law, only to be considered as mere contracts of indemnity, upon which the payee or obligee can recover only such sum as the parish shall have expended.

Seemle, it is not necessary, however, that the compulsory provisions of that statute should be pursued, but the security must be substantially such as is thereby required.

COLE
VERSUS
GOWER.

INDEBITATUS assumpsit against the defendants on a promissory note, bearing date the 8th of April, 1803, whereby they promised, two months after the date thereof, to pay the plaintiffs by the names and additions of Messrs. Cole, Sharp, Godfrey and Olney, the churchwardens and overseers of the poor of the parish of Pullorhill in the county of Bedford, or order, the sum of 5l. The declaration also contained a count for money paid, laid out, and expended, and one on an account stated.—PLEAS, as to all but 5l. the general issue and a tender of the 5l. The REPLICATION took issue on the non-assumpsit, and denied the tender, whereupon issue was joined. The cause came on to be tried at the last Lent assizes for the county of Bedford, before Mr. Justice Grose, when a verdict was found for the defendants on their plea of tender of the 5l. and for the plaintiff on the general issue, with 20l. damages, subject to the opinion of the court on the following case:

On the 22d of Jan. 1803, one M. T. single woman, being a pauper belonging to the parish of Pullorhill, swore a bastard child of which she was then pregnant to Gower, one of the defendants, who was apprehended

by virtue of a warrant in that behalf on the 7th of *April* following. Shortly after he was apprehended, and before he had been carried before any magistrate, he offered to compromise the affair with the parish-officers for 20l. if they would give him time to pay it in, as it would not be in his power to raise the money at once. The parish officers agreed to accept the 20l. and to take it by such instalments as would best suit *Gower's* convenience, provided a sufficient person would join with *Gower* in some security to pay those instalments.—*Gower* thereupon requested to be released out of custody, that he might find some such person to become a surety with him; promising to meet the parish-officers the next day, viz. the 8th of *April*, in order to finish the business by giving the security required. *Gower* was accordingly released out of custody, and on the following day, viz. the 8th of *April*, he met the parish-officers. The other *defendant*, *Piggott*, also attended the meeting, and *Gower* offered *Piggott* as the surety for the payment of the 20l. It was finally agreed that 20l. should be secured by three joint promissory notes of the *defendants* to bear date respectively the said 8th day of *April*, and be payable for the following sums and at the following intervals:

The first, whereon the present action is brought, at two months date for 6l.; The second at twelve months date for 7l. The third at twenty-four months date for 7l. being 20l. in the whole.

These three notes were thereupon accordingly prepared by the *defendant*, *Piggott*. He also prepared the memorandum or undertaking herein after set forth.

Before the notes and the memorandum or undertaking were signed, *Piggott* (in the presence and hearing of *Gower*,) asked the parish-officers whether they expected that the notes should be paid in case the *child* died; who answered that, without doubt, it would be ex-

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pected that the money should be paid in all events.— Whereupon the *defendants* signed three promissory notes, and delivered them over to the plaintiff *Cole*, and he signed the memorandum or undertaking on the part of the parish, and delivered it over to *Gower*; which said memorandum or undertaking was witnessed by one *John Edwards*, and is as follows: Whereas *Mary Taylor*, of the parish of *Pulloxhill*, in the county of *Bedford*, single woman, hath, by her voluntary examination, taken in writing upon oath before *Edward Tangueray*, clerk, one of his majesty's justices of the peace for the said county of *Bedford*, on the 22d day of January, last past, declared herself to be with child and that the said child is likely to be born a bastard, and to be chargeable to the said parish of *Pulloxhill*, and hath charged *William Gower*, late of *Silsoe*, in the said county of *Bedford*, but now of *St. Albans*, in the county of *Hertford*, with being the father of the said *bastard child*; and whereas the said *William Gower*, and *Isaac Piggott* of *St. Albans* aforesaid, have this day given to the church-warden and overseers of the poor of the said parish of *Pulloxhill*, their joint notes of hand for the payment of 20l. by instalments, to indemnify the said parish from the costs and charges of maintaining or providing for the child or children, of which the said *Mary Taylor* hath declared herself to be with child as aforesaid: Now, therefore, I, *Joseph Cole*, one of the church-wardens, of the said parish of *Pulloxhill*, on behalf of myself and the rest of the inhabitants of the said parish, do hereby undertake and agree to provide for, take care of, and maintain such child or children of which the said *Mary Taylor* is now with child as aforesaid, and to save harmless and indemnified the said *William Gower* from the keeping and maintaining of the same, and all costs and charges and expences which he may sustain or be put unto on account thereof, as witness my hand this 8th of *April* 1803, *Joseph*

Cole. Witness, *John Edwards.* 8th *June*, 1803, 6l. 8th *April*, 1804, 7l. 8th *April*, 1805, 7l. Total, 20l.

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The first note fell due the 11th of *June*, 1803, and on the 17th of the said *June*, *Mary Taylor*, the pauper, was delivered of a still-born bastard child, in the parish of *Pulloxhill*; and the *defendants*, being called upon to discharge their first note, and supposing that the parish had not expended more than 5l. on the premises, they tendered that sum in part payment of their first note, but they refused to pay the twenty shillings remaining on the said note; urging that 5l. was the full extent to which the parish had been damnified.

The *defendants* at the trial, proved their plea of tender of the 5l. and the *plaintiffs* did not make out evidence that the parish had been damnified to above the amount of 5l. but, on the contrary, that they had only expended 3l. 14s. by reason of the premises.

The question for the opinion of the court is, whether the *plainiffs* are entitled to recover?

BEST, for the plaintiff. "By the statute of the 18 *Eliz.* c. 3, and also by the 6 *Geo. II.* c. 31, s. 1, the putative father is bound to provide for his child; and, by the latter statute, a power is given to the magistrates to take the father, before the birth of the child, and commit him to gaol, unless he enters into security to provide for its maintenance. The note and agreement would at any rate, be good before the statute 6 *Geo. II.* c. 31; and now, since that statute, may be considered as an indemnity both to the overseers of the parish for the provision for this child, and to the father also against being proceeded upon under that statute, by which he would be bound to provide a weekly sum for the maintenance of the child, for an uncertain time, where-

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as, by giving this note, he is indemnified for a certain and definite sum. Neither is this against the provision of that statute, for that statute applies only to persons who are proceeded against in the manner therein prescribed, and does not prevent the parish officers from agreeing to a different mode of indemnity. It may indeed be said that this note is only an indemnity to the parish, and therefore no consideration passes to the *defendant*; but the case states that the money was offered to be paid down, and as the father would have been obliged to have entered into a bond, or have paid the money down, it clearly operates as an indemnity, which is a good consideration, as to him. It is a contract in writing, whereby the party binds himself, by a promissory note, for that which he is, by law, liable to pay; and the note is, therefore, good in itself, and there is a sufficient consideration for it, so that the present action is maintainable.

GASELEE, *contra*. " This promissory note is altogether void, upon general principles of law and public policy; for it is, in effect, a wager on a subject, which between these parties, is not lawful. It is a contract by the overseers for a certain sum to indemnify the father against all claims of the parish for the support of the child. It is therefore a mere wager upon the life of the child, and as the parish officers have thereby an interest in it's death it cannot be good in law; although such a wager might be good as between indifferent persons not so interested, and not having the custody and care of the child; *Jones v. Randal*.* As the statute 6th *Geo. II.* c. 31, s. 1, provides a certain mode for obtaining indemnity to the parish, the overseers ought to pursue that mode and no other; as in the case of sheriff's bailiffs, who can take no other security than a bail bond."

* *Cowper*, 17, 37.

LAWRENCE, J. " You do not mean to say that, in order to have an indemnity, the putative father must be taken before a magistrate on a warrant."

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GASELEE. " I do not mean to contend that; but only that the officer must take an indemnity such as is prescribed by the statute, that is to say, only to the extent of the damage which the parish may sustain; and cannot commute the whole for a specific sum. This note is also void with respect to the agreement on the part of the parish officers; for they cannot bind either the parish or the succeeding officers, to take this fixed sum instead of indemnifying the parish from the burthen of maintenance: and it is, therefore, without consideration."

LAWRENCE, J. " The father will still be liable for support of the child; then these persons agree to indemnify him; and, if they do not, they will be liable over to him upon this note, supposing their agreement to indemnify to be good and binding upon them personally."

GASELEE. " But this agreement is in the character of church-warden, " I, *Jos. Cole*, for myself and the rest of the inhabitants of the said parish, do agree," and then, though *Cole* might be liable to indemnify the putative father personally, yet it is a fraud upon him, because he relied upon the security of the parish to indemnify him. At any rate, the note is only good for the actual sum expended by the parish, which is only 3l. 10s." He then cited a case, *Wild v. Griffin*, which was tried at *Westminster*, at the sittings after last *Trinity* term. That case, as far as I could collect from an *ore tenus* report by *Garrow*, who was in the cause, was an action on a promissory note for 14l, given by a putative father, to the plaintiff, *Wild*, as the overseer of the parish of *St. John's, Clerkenwell*, to

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which may be the means of oppression, or an inducement to them to neglect the parish children."

LAWRENCE, J. "I am, on the whole, of the same opinion, though I cannot but say that I have had some doubt about it; because it may happen that a poor man, who has friends, may be able to raise money to pay a certain sum, to be discharged from the support of a child, though he could not get friends to enter into a bond of indemnity for him; and the consequence will be that such a man will go to gaol, and the parish will get nothing from him. But, upon principles of public policy, I cannot help saying, that I think the better judgment will be to hold, that notes of this kind are not valid. I hope, indeed, that it never entered into the mind of any man to let such a consideration operate upon him so as to render him careless of the life of the child; but I think it would be improper to hold out any such temptation. I think, also, that the parish ought not to be either a gainer or a loser by these bargains, and ought to have only a proper indemnity. On the whole, therefore, I think the better judgment is, that these notes ought not to be considered valid, unless they are considered as mere notes of indemnity."

LE BLANC, J. expressed himself of the same opinion, and, besides stating the like grounds as above, added, "The money in these cases goes to the now parish officers to relieve the present parishioners from the rate of the present year; whereas, the burthen of the maintenance of the child falls upon the parishioners of the next and subsequent years. Independently of which, the persons who are to give the indemnity to the father, against being called upon by the parish ought to be such as have no interest in the death, rather no care and controul over the management and life of the child, but rather persons who have an interest in the life of it."

JUDGMENT for the DEFENDANT.

DOE dem. STRICKLAND against SPENCER and Another.—January 29.

1805.

On a lease from year to year of a farm, the tenant to enter on the housing at Old Lady Day, and the land at Old Candlemas, &c. with an agreement to quit at the times of entering, the rent being payable at Old Lady Day and Michaelmas; held, that a notice to quit, half a year before Old Lady Day, which is the substantial entry on the farm, is good, the entry on the land at Old Candlemas Day being only in the nature of a liberty. Semble, the day of payment of the rent may be always considered as the substantial time of entry.

THIS was an ejectment, tried before CHAMBER, J. at York, at the last summer assizes. The only question was, whether the defendants had received due notice to quit. A person who was formerly agent for the lessor of the plaintiff proved the letting of the lands, and that all the lands let by him were taken from Candlemas day. The lease which had now expired being produced, it appeared the lands were let "to enter on the tillage land from Candlemas, last past, and the housing, and the rest of the farm from Lady Day, and it is agreed that when the said Spencer and T. Martin shall leave the premises, they shall and will quit according to the times of entry." There was no evidence of any change in the agreement as to the time of quitting; though the rent was at one time raised. Rent was received for half a year up to Old Lady Day, 1802. Notice to quit was given, dated, and served the 23d of August, 1803, to quit at the end of the current year of the tenancy; which was eight days short of half a year's notice up to Candlemas Day. The defendant's counsel objected that the notice should have been, as to the arable land, half a year's notice to Candlemas Day. The learned judge reserved the question, and a verdict was

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given for the *plaintiff*, with liberty to enter a nonsuit, &c. ; and a rule to shew cause having been obtained,

PARKE and WALTON, for the *plaintiff*, cited *Doe* on the demise of *Daggett v. Snowden*,* where it was held that an agreement to take a farm, the arable from *Old Candlemas*, the pasture from *Old Lady Day*, and the meadow from *Old May Day*, paying rent half yearly, at *Old Michaelmas* and *Lady Day* is substantially a taking of the whole from *Old Lady Day*; and notice to quit delivered before *Old Michaelmas* is sufficient to determine the tenancy; which they contended was precisely in point with the present case. The latter, WALTON, also cited a M.S. case, *Doe d. Lord Egremont v. Clayton*, *York summer assizes*, 1795, where ROOK, J. held a similar notice good, and he said, that the custom of entering at *Candlemas day*, was very usual, and that it was in order to *haine* the land, (i. e.) to inclose it.

COCKELL, *Serjeant*, *contra*, cited *Doe d. Lord Grey de Wilton v. Grant*, *Stafford summer assizes*, 1788, before Lord KENYON, C. J. quoted by GROSE, J. in *Doe d. Allan v. Calvert*,† in which it was held that where the tenant entered on different parts of the farm at different times, as it was one entire demise, the notice should be for half a year expiring at the first period of entry. And he contended that *Doe v. Snowden* did not govern this case, for that only decided what was the proper notice upon such an entry at different times, where there was no express stipulation as to the time of the tenant's quitting; whereas in this case there was an express agreement to quit at the times of entry, which being an entire agreement, the notice should be six months or half a year previous to the earliest period, namely, *Candlemas Day*.

* 2 Black. 1224.

† 2 East, 384.

LORD ELLENBOROUGH, C. J. "The rule of law with respect to this subject was originally that there should be reasonable notice, and in the time of *Henry VIII.* reasonable notice was held to be half a year; but since that time, the case of *Doe v. Snowden* has been decided, and has laid down a rule pretty generally acted upon, that there shall be half a year's notice up to the substantial time of entry, that is, up to the rent day, although the incoming tenant should have a privilege of entering on certain parts of the land at an earlier time. By the time of entering, therefore, must be understood the time of taking the beneficial possession of the lands; for the general way of considering the earlier entry on part of the land is rather as a privilege than as a substantial entry. Indeed it would be better to adhere to the rule laid down in *Doe v. Snowden*; without considering very nicely whether or not the whole of the lands may be entered upon at the same time; though I by no means will say that it is not a very well advised rule. The words in this case as to the quitting being at the same time as the entry, may be understood to refer rather to the substantial entry, though at first I thought those words might make some difference; but to say that the tenant shall quit at the times of his entering is nothing more than the law ordinarily requires."

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~~change~~
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GROSE, J. "The entering at *Candlemas* is only a privilege to enter and plough the lands; and the rule laid down in *Doe v. Snowden* is a very useful rule, which I should be sorry to disturb. If I give a notice, in such a case as this, in *August*, so long as half a year before *Candlemas Day*, there may be two crops of grass got, which would not be got on the usual notice, and that is perhaps a good reason why the notice should not be given till near upon *Michaelmas*."

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LAWRENCE, J. "The rule laid down, in the case of *Doe v. Snowden*, is a reasonable one, that there should be half a year's notice, reckoning to the substantial time of entry. As to these lands which will be of no use to the tenant, I do not see if it had been a little short of the time, and if it would be of no inconvenience to him, that it should not be sufficient. The reason why the entry on the land is earlier than on the house, in this case, is, that the land is of no use to the tenant for the time, for whatever he sows will then go to the next tenant, and therefore it is not regarded as the substantial time of entry. Another way of considering the case is, as was done in the case in the *Common Pleas*, namely that this entry at *Candlemas* is only a privilege allowed to the tenant; and that is probably the right way of considering it. Besides, as I observed in the course of the argument, it is usual to make farming leases with a liberty for the incoming tenant to enter before *Lady Day* to plough the land, and that the outgoing tenant shall have liberty to stay to thrash out his corn; and that is the common form of leases, nor does it essentially differ from the present lease. Though it is expressed in other words, it means the same thing, and amounts to a mere liberty, and is not a substantial entry as a commencement of tenancy."

LE BLANC, J. "If there were any real difference between the cases, I should adhere to the authority of *Doe v. Snowden*, but, I think it has been properly considered, that when it is agreed that the tenant shall come in at a given time, and go out at a given time, different from the rent day, it is only a privilege to the incoming tenant that he should have an opportunity of laying out his money on the land which he is to occupy. The only reason for giving notice is, that the tenant shall not suddenly be turned out of a beneficial occupation, but here the party going out cannot

lose any thing by this notice; for the land during the time would in fact be of no use to him."

RULE DISCHARGED.

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Geo. BARNARD *q. t.* against JOHN GUY—January 31.

When a plaintiff in error had sued out his writ of error in time to stay execution, &c. but had made a mistake in the name of the defendant, in error, and the defendant in error had issued execution, this court allowed the plaintiff in error to have a rule to shew cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule in order to allow the plaintiff in error to amend his writ. N. B. The original action was for a penalty by a common informer, and there was real error.

IN this case the defendant sued out a writ of error in due time to prevent the plaintiff from having execution, but in filling up the writ a mistake was made in the christian name of the plaintiff, and it appeared as a writ of error in the *Exchequer chamber* in a cause of *John Barnard v. John Guy*. The plaintiff sued out execution and the defendant paid the money into the hands of the sheriff.

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q. t.
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DAMPIER, for the defendant, obtained a rule to shew cause why the money paid into the hands of the sheriff should not be paid into court pending the above writ of error, in order that the defendant might have time to amend his writ of error, which he could not do until the return of the transcript in the *Exchequer chamber*. The original action was for penalties against an attorney upon the act relating to the taking out of certificates, and judgment was suffered by default, upon the authority of a case decided in this court; but the judgment in that case was afterwards reversed in the

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Exchequer chamber; and therefore, there was real error on the record.

Upon hearing GIBBS, for the *plaintiff*,

The court enlarged the above rule obtained by DAPIER in order to allow time for the defendant to amend his writ of error.

WRIGHT, (administratrix of WRIGHT) against JONES.
January 31.

Administratrix allowed to discontinue without payment of costs.

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versus
JONES.

RULE to shew cause why the *plaintiff* should not be at liberty to discontinue, without payment of costs.

The *plaintiff* had taken out administration in the diocese of *Litchfield*, and it was found there were *bona notabilia* of the deceased in two counties; whereupon GASELEE, for the *plaintiff*, obtained the above rule to discontinue on the authority of *Bennett v. Coker*.*

PARNTER shewed cause, and contended that as, in case the *defendant* had signed judgment of *non pros*, he would be entitled to costs; so in case of discontinuing the action, the *plaintiff* ought still to pay the costs; for there could be no material distinction between the termination of the writ by the one mode or the other against the *plaintiff*.

Lord ELLENBOROUGH, C. J. "If the *plaintiff* were to proceed in her action, she would not be liable to pay costs, and you have not signed a judgment of *non pros*; why then ought the *plaintiff* to pay costs upon discontinuing?"

RULE ABSOLUTE.

ANONYMOUS.—Costs to defendant on a verdict for the plaintiff.

1805.

Where the plaintiff arrested the defendant for money due for coals, and recovered less than the sum sworn to, the defendant was allowed his costs, the plaintiff having, previous to the arrest, compounded a penal action for delivering the same coals short of measure, and the arrest being for the price of such coals considered as full measure.

RULE to shew cause why the plaintiff should not pay to the defendant his costs in an action, in which there was a verdict for a less sum than that for which the defendant was held to bail. ANONYMOUS.

The plaintiff's original demand was 12l. 12s. 6d. for five chaldron of coals, and there was a verdict for only 10l. 4s. because the coals, on remeasurement, were found to be deficient in quantity. There was also an action brought for a penalty on account of this deficiency in measure; whereupon the plaintiff paid the penalty and compounded the action.

LAWES shewed cause, and produced an affidavit in which the plaintiff stated that he verily believed the coals were full measure when sent to the plaintiff, but as the person who delivered them was not to be found he could not proceed to trial on the action for the penalties.

JERVIS, *contrè*. "The arrest in this cause took place after the payment of the penalty by the plaintiff, and the deficiency was three-fourths of a chaldron in a quantity of five chaldron."

LORD ELLENBOROUGH, C. J. "There having been an admeasurement by a public officer, the plaintiff must have known how much was actually delivered; and although, it is said, that admeasurement was a sort

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ANONYMOUS.

of *ex parte* adjudication, yet it was such as he thought conclusive upon him or he would not have paid the penalty."

RULE ABSOLUTE.

HARRISON *against* PARKER and Another.

One who has built a bridge for public use on the soil of, and under a grant of liberty for that purpose from another, may maintain trespass de bonis asportatis, against a wrong doer, who pulls down a part of it, and takes away the materials of which it was built. For when severed from the bridge, the property in the materials reverts to their original owner.

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THIS was an action of *trespass*, and the first count of the declaration stated that the *defendants* broke down, knocked down, threw down, prostrated, damaged, spoiled, and destroyed the walls, battlements, buttresses, parapets, piers, and other erections and buildings of and belonging to a certain bridge of the *plaintiff*, in a certain part thereof, situate and being at *Stockport*, in the county of *Chester*, and took and carried away the materials, to wit, *stones*, flags, bricks, wood, and rubbish, and converted and disposed thereof to their own use. The second count was for similar trespasses, to a moiety of a bridge of the *plaintiff*, situate at *Stockport*. The third count for trespasses to certain walls of the *plaintiff*, erected at *Stockport*, but not described as belonging to any bridge. The fourth count was for seizing, taking, and carrying away certain goods and chattels of the *plaintiff*, and converting and disposing of them to the *defendant's* own use. The *defendants* pleaded the general issue. The cause came on to be tried before *James Mansfield*, Esq. and *Francis Burton*, Esq. his Majesty's justices at *Chester*, at the last summer assizes for the county of *Chester*, when the jury found a verdict for the *plaintiff*, with 2l. 2s.

damages, subject to the opinion of the court upon the following case :

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In the year 1785, the *plaintiff*, being the lord of the manor of *Brinnington*, and owner of certain land there, adjoining a *river goit*, running between and separating the manor of *Brinnington* from the manor and barony of *Stockport*, and Sir G. *Warren*, being then lord of the manor and barony of *Stockport*, and owner of certain land in *Stockport*, adjoining the said *river goit*, and opposite to the land of the *plaintiff*, contracted and agreed with Sir G. *Warren*, for the liberty of erecting a bridge over the *river goit* ; and accordingly, by indenture, dated the 12th of *December*, 1785, between the said Sir G. *Warren*, of the one part, and the *plaintiff* of the other part, Sir G. *Warren* in consideration of 5000*l.* paid to him by the *plaintiff*, gave and granted to the *plaintiff* the several premises, rights, and privileges set forth in the said indenture. The *plaintiff*, also, on the 12th of *December*, 1785, entered into a bond to Sir G. *Warren*, in the penalty of 1500*l.* conditioned for the performance of the covenants, clauses, provisoes, articles, and agreements in the above mentioned indenture. The sum of 1500*l.* was accordingly paid by the *plaintiff* to Sir G. *Warren*. The *plaintiff* afterwards built the bridge at his own expence with materials purchased by him, and the whole expence incurred by the *plaintiff* in building the bridge, which since that time has been, and is a public bridge, amounted to 1296*l.* The bridge has never been repaired by or at the expence of the county. In the month of *May*, 1803, the *defendants* were owners of a house in *Stockport*, at the foot of this bridge, which is on the *Stockport*, side of the *river goit*, and in front of the said house, for the length of ten feet, and carried away the stones arising therefrom, and laid the same on land there, which did not belong to, nor was in the possession of the *defendants*, but lay in front of and between the

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versus
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and another.

said dwelling-house and the said street, leading from the said bridge. The stones lay there several days after being so severed from the battlements of the bridge, and, after they had so lain there several days, the *defendants* took away the stones, and used and applied them in building a wall.

The question for the opinion of the court is, whether the *plaintiff* is entitled to recover? If the court should be of opinion that he is so entitled, then the present verdict to stand; if otherwise, a nonsuit to be entered.

THE GRANT, a copy of which was annexed to the case, contained the following words, " the said Sir G. Warren, hath, &c. and by these presents doth for himself and his heirs, give, grant, confirm, and assure unto the said *James Harrison*, his heirs and assigns full and free liberty and license, power, and authority to erect and build, or cause to be erected and built, a good and substantial brick and stone bridge from, &c. [here followed the description of the bounds and site thereof;] And also liberty to fix buttresses and foundations, and to lay materials for the purpose of building on a field, called *the further park*, for and during so long time as the same should remain unbuilt upon and unsold and undisposed of by Sir G. Warren, his heirs and assigns; together with the free and uninterrupted use and enjoyment to and for him the said *James Harrison*, his heirs and assigns, and his and their tenants, servants, and all other persons resorting to or travelling to or from the township of *Brimington* aforesaid to or from the said town of *Stockport*, or elsewhere, of a good and sufficient road, way, or passage, &c. [here the said road was described;] To have, hold, and enjoy all and singular the liberties, powers, and privileges hereby granted, with every of their appurtenances, unto the said *James Harrison*, his heirs and assigns for ever, subject nevertheless to the covenants, &c.

hereafter contained. Then followed the covenants; amongst which were a covenant by J. H. to build the bridge; also to finish the same and make it fit for passengers by the 29th of September, 1786; also to repair the bridge; and also to repair a road, way, street, or passage, from the said, *new bridge*, into the public highway in *Brinnington* aforesaid, &c. And that such bridge and the roads leading to and from the same, shall be left open and unbuilt upon, and be as public highways or roads, for all persons travelling to and from the said town of *Stockport*, and be used and enjoyed accordingly, without being liable to the payment of any toll or sum of money for passing over the same bridge or roads. Covenant by Sir G. Warren that he has good right to convey. And lastly, "it is hereby declared and agreed that the said lands of the said Sir G. Warren on the *Stockport* side of the river shall not at any time hereafter be used or occupied by the said J. H. his heirs or assigns, for any purpose whatsoever, save and except the building of the said bridge, &c.

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LITLEDALE, for the *plaintiff*. "The first question to be considered is, whether the grant stated in the case gives to the *plaintiff* an interest in the bridge so as to enable him to bring trespass. Now the *habendum* is 'to have and to hold the said privilege unto him the said *Jahn Harrison* his heirs and assigns for ever;' and there is, on his part, both a covenant to make the bridge, and a covenant to repair it. Sir G. Warren, therefore, professes by his grant to give a property in the bridge; and for the purpose of having such property it is not absolutely necessary that there should be a property in the land and soil. But there is covenant from the *plaintiff* that he will not use the *land* for any other purpose, which of itself must give him by implication a right to use it for that purpose, namely for

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the building of a bridge; and if the bridge was not to belong to the *plaintiff*, he could not comply with the covenant to build a public bridge or bridge for the public use; neither could he comply with the covenant to repair, which covenant is not like a covenant to repair a public road, because that must be a thing which is altogether in its nature public, but this is an erection of something *de novo*, the property in which, subject to the use of the public, must belong to the person who erects it."

LORD ELLENBOROUGH, C. J. "It is not contended that the bridge is the property of Sir G. Warren, the question is only between you and the public, and not between you and Sir G. Warren."

LITLEDALE. "Then although this bridge is become public, for the purpose of passing over it, yet, subject to that right, the property still continues in the *plaintiff*, for the people of the county are not a corporation capable of taking by grant. They have only the burthen of repair cast upon them, in consideration of the *user*, but the property remains in the original proprietor; as in the case of highway, the lord and owner of the soil may bring trespass for it, and so in the cases concerning markets, *Sir John Lade v. Shepherd*,* *Mayor of Northampton v. Ward*.† Then if the right of the *plaintiff* is thus established, the present action will lie; for it cannot be said that the injury here done is a *nuisance*; for the taking down the battlements is not necessarily a nuisance, because they may be only for ornament and not for the public service. But even admitting that it is a nuisance, that will not *merge*, or take away the remedy of the *plaintiff*; for trespass is not merged in a *misdemeanor*; it is only

* 2 Str. 1004.

† 1 Wils. 107. 2 Str. 1238.

merged in a felony: and in case of a nuisance to a highway the only reason why trespass will not lie is because of the multiplicity of actions, which inconvenience cannot occur in this case. Neither is it necessary that the *plaintiff*, as owner of the bridge, should be put to prove any specific damage. And it is clear that, at least the *plaintiff* is entitled to recover upon the second count for the *asportavit*; for the stones which are there charged to be carried away by the *defendant* are clearly his property, and not that of the public."

[Some difficulty was suggested as to the verdict in this case, because the jury had not assessed separate damages; but the court held, that as there was no error upon the face of the record, and the question was put generally whether the *plaintiff* was entitled to recover, judgment might be given, if the *plaintiff* should be entitled to recover on that count alone; and, if necessary, the case might be sent down for the jury to assess separate damages upon a *venire de novo*.]

YATES, *contrà*. "The terms of this grant do not convey such an interest to the *plaintiff* as to entitle him to maintain an action of trespass; and whether he could or could not maintain an action upon the case for special damages it is not material to inquire. In order to maintain trespass for an injury of this nature, it is necessary that the party should have either a right to the soil or a right of using the land, altogether exclusive of the rights of other persons; such as *prima veritas terre*. But the whole purpose of this grant may be effected without conveying to the *plaintiff* any such right, and without passing the *land* with it, and *Harrison* had no property in the bridge when built separate from that of the public; for both the bridge and the highway were to be free from toll; and the inference drawn from the covenants to build and repair,

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that is not conclusive, because those covenants must be construed only by reference to the right, and the subject matter which passes by the grant; and all the cases in which a person who had not the soil was held to be entitled to maintain trespass were cases of a right of exclusive possession. *Burt v. More*,* *Taylor v. Whitehead*.†

LAWRENCE, J. "Can a man have a grant of a more exclusive use of the land than by a liberty to build a bridge upon it?"

YATES then contended that the public would still be bound to repair the bridge, notwithstanding the covenants in this grant, and cited the *King v. Liverpool*,‡ *Regina v. the Duke of Buccleugh*,§ and also 9th Reports, 138, and *Cro. Eliz.* 664, to shew that the plaintiff could only have an action upon the case in respect of special damage to him. And, upon being pressed by the court for an answer to the second count, he contended that the materials, being a part of the bridge, they are given to the public also, in like manner as the stones and gravel which compose a public road.

GROSE, J. "Suppose *Harrison* had taken down these stones and put others in the place of them, and rendered the bridge equally commodious, could the public indict him for doing so?"

LORD ELLENBOROUGH, C. J. "If it were necessary, in deciding this case, to say whether the plaintiff can maintain trespass for pulling down this bridge, it might become necessary to consider whether the property in the bridge passed to him by the grant stated in the case. But that question is not material upon the second count of the declaration, on which, the question is only this, whether the person of whose ma-

*- 5 Term Rep. 329.

† 2 Doug. 716, 745.

‡ 3 East, 86.

§ 1 Salkeld.

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terials the bridge was originally constructed, and whose right of property in those materials is only suspended whilst they are employed for the purpose for which they are given to the public, does not take back his property in those materials when they are no longer applied to those purposes? Whether when the bridge, which is composed of certain *elements*, to use that expression, which belonged to him, is by some means resolved into those elements again, which were only dedicated to the public in the combined form as a bridge, the right of the person who so dedicated them to the public does not result again to him; and whether as against a wrong doer, by whom they were carried away and converted to his own use, he cannot maintain this action? Now it must be understood that these materials are dedicated, I will not say *given* to the public, because that implies the parting with the property, only for the special purpose of constituting a public bridge; and for no other purpose, nor for any other time than so long as they continue in that form as a bridge; which seems to determine the question. But at the same time I do not lay down, that *Harrison*, having so dedicated the materials, could himself have severed them from the bridge, or have destroyed the bridge. I do not lay down that proposition one way or the other, so as to determine, whether in that case he would or would not be liable, upon an indictment, just as any other person. But upon the general question reserved for us, whether the *plaintiff* is entitled to recover, we think that he is entitled to recover, upon the second count of this declaration. And I may observe, that where a founder of a college gives his land to the purposes of the foundation, and the body becomes wholly extinct, the property results to his heirs; but I put this case merely by way of analogy and not as a case of identity, for I will not say that it is applicable in all respects. And had the county used the

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stones and materials again, in the repair of the bridge, no action would lie against the person who should use them."

The rest of the court assenting, there was

JUDGMENT for the PLAINTIFF.

The KING against ST. JOHN'S MADDERMARKEET.

February 6.

Stocks or annuities in the public funds are not rateable to the poor's rates under the 43 Eliz. c. 2, nor "as money out at interest," under 10 Anne, c. 6, private acts, which impose a rate to be made Norwich," on all persons having and using stocks and personal estates in the said city, or having money out at interest."

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versus
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City of Norwich, and county } AN appeal was made
of the same city. } by Anne Suttles
against an assessment of 1000l. stock, or personal property, charged upon her by a rate made by N. L. and J. T. church-wardens, and E. S. and E. P. overseers of the poor of the parish of St. John Maddermarkeet, in the said city, &c. by virtue of a warrant or order, dated the 7th of August, from J. B. and J. H. esquires, then and now two justices of the peace, &c. grounded on a certificate, dated the 6th August, then last past, under the common seal of the governor, deputy-governor, assistants, and guardians of the poor within the said city and county of Norwich, and liberties of the same, appointed and authorised by virtue of an act of parliament made in the 10th year of the reign of her late majesty, Queen Anne, entitled "an act for erecting a workhouse in the city and county of Norwich for the better employment and maintenance of the poor there; by which said warrant the church-wardens and overseers of the poor of the said parish were, according to the directions of the said act of parliament, authorize

and required to rate and assess the sum of 137l. 11s. 10d. on the inhabitants and on every parson and vicar, and on all and every the occupiers of lands, houses, tenements, tithes, impropriate appropriation of tithes, and on all persons having and using stocks and personal estates in the parish of *St. John Maddermarket*, or having money out at interest in equal proportion, as near as may be, according to their several and respective values and estates. And, on hearing the said appeal, it appeared to this court, that, ever since the passing of the said act, lands, houses, tenements, stocks, and personal estates, within the said city and county, and money out at interest, as well without as within the said city and county, of the respective inhabitants within the several parishes of the said city, have been constantly assessed and rated to the poor's rate of and for each parish, according to the circumstances of such inhabitants; and it also appeared, that the said *Anne Sutcliffe*, the said appellant, had not any stock or personal estate in the said parish of *St. Mary Maddermarket*, or in any other parish or hamlet within the said city and county, nor had any money out at interest on real or personal security, but that she was possessed of money vested in the public funds or on government security, and then standing in her name in the books of the governor and company of the Bank of England in the five *per centum* bank annuities, and therefore the said appellant admitted, that the said assessment was just if the said last mentioned money was liable to be rated. And this court, on hearing the said appeal, being of opinion that money vested in the public funds or on government security, was not, by virtue of the aforesaid act, liable to be rated to the relief of the poor, doth allow the said appeal, and relieve the said *Anne Sutcliffe* from the said assessment of 100l. stock charged upon her by the said rate."

WILSON, in support of the order of sessions. "This

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question does not arise upon the 43 *Eliz. c. 2*, but upon a private act of parliament, 10 *Anne, c. 6*, which directs the rate to be made, as stated in the case, upon money out at interest. Now here the mention of one or more sorts of personal estate is the omission of all others, and by charging the rate upon all stock in trade, and money out at interest, in the city of *Norwich*, other personal property which is not enumerated in it is excluded. Now, stock in the public funds is not money out at interest in the city of *Norwich*; for in courts of equity there has been always a distinction between them, and under a devise of money out at interest, stock in the public funds will not pass. Nor is this property within the parish; and no property can be rated unless it is considered as being within the parish; *Rex v. White*.* In case of money out at interest, as the interest is to be paid to the creditor wherever he is, it may be considered as personal property where he resides, but the interest or annuity here is payable at the bank, and ought to be rated there, if at all. And by the general public acts creating these annuities, they are exempted from all assessments, taxes, and charges whatsoever.' See 24 *Geo. III. c. 39, &c.*"

ERSKINE and BEST, G. N. "This rate is not excluded by the clause in the last cited acts, for it is not a tax upon the stock, but upon the person of the proprietor in respect of his property; as in the case of the late *property tax*, which affects money in the public funds. And as to the meaning of the statute 10 *Anne, c. 6*, these annuities are debts of the public, and it cannot be supposed but that the act of parliament was meant to apply the words, 'money out at interest' in the common acceptation of them, which would include the public stocks. So much is this the popular sense of the words that the case states that the party was possessed

of money in the public funds, and a share in new stock is commonly called a slice of the loan. In the *King v. Hardy*,* and also in the *King against Layton*,† this very act was before the court, and though the question was chiefly upon the inequality of the rate, yet if this objection had been tenable it would have occurred to the court: it is therefore to be implied from those cases that this stock ought to be rated. The property to be rated is also considered only as evidence of the means and ability of the party, and this is not only such evidence, but if money out at interest is to be rated, the money in the public funds constitutes by far the greater proportion of such money, and a very great proportion of the personal property of the inhabitants of the parish."

Lord ELENBOROUGH, C. J. "Whatsoever may be the state of the country at present, it must be considered that at the time when this act passed, the public debt was very small, and that very little of the public property was then vested in the funds, so that the last argument does not apply. But we are here upon the construction of a positive act of parliament, in which this stock is evidently not enumerated. 'Having money out at interest,' must mean, not indeed the possession of the money, because it is stated to be *out*, but having a right at some time or other, at a period longer or shorter, to reclaim the money which is so outstanding. Now that is by no means a description of money in the public funds, with respect to which the parties have not the money out at interest, but, in lieu thereof, have an annuity. Then if upon the principle that, *mentio unius est exclusio alterius*, this is not mentioned and included in the 10th *Annæ*, c. 6, it is clearly not rateable

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* *Comper*, 579.

† 1 *Const. Appendix*.

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under the 43 *Eliz. c. 2*, because it is not local and visible property, in the parish. The sessions have therefore done right in quashing the rate."

GROSE, J. "I am of the same opinion. It must be taken, that the words 'or money out at interest,' mean not money vested in annuities, but money which the party has a power to call in. This is money in the public stocks, and if the legislature meant to rate stock in the funds it would have expressly done so."

LAWRENCE, J. "This is not local and visible property within the parish, and it has been frequently decided, that nothing is rateable to the poor under the 43 *Eliz. c. 2*, which is not locally rateable, and this statute, being made in *pari materiâ*, ought to receive a similar construction."

ORDER OF SESSIONS AFFIRMED.

The KING against GEORGE ROBINSON.—February 6.

A mandamus to compel a magistrate to enforce a conviction for the plaintiff, refused, where he had returned that the defendant was convicted of the penalty before him, but that the said conviction was invalid in law, and there was not an offence for which the said penalty was payable or could legally be levied.

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MANDAMUS to George Robinson, esq. one of the justices, &c. for the county of Durham, commanding him to levy or cause to be levied a penalty in a certain conviction against one John Longstaff, &c.; whereupon, the said George Robinson returned, that the within named George Longstaff was upon the complaint and information of the said Henry Barron, inspector of hides and skins for the market town of Sunderland near the Sea, on the 24th of February, at San-

derland near the Sea, convicted before him as such justice of the peace, which conviction is as follows; viz. *Durham*, to wit, *Be it remembered*, that on the 24th of *February*, 1804, *George Longstaff*, of *Sunderland near the Sea* in the county of *Durham*; butcher, was upon the complaint of *Henry Barron*, inspector of raw hides and skins, at *Sunderland* aforesaid, convicted before *George Robinson*, Esq. one of the justices of the peace for the said county of *Durham*, in the mitigated penalty of 200l. in pursuance of acts passed in the 39th and 40th and 41st years of the reign of his Majesty King *Geo. III.* or some of them for sending from *Sunderland* aforesaid, 100 sheep skins without first bringing the same to the said *Henry Barron* to be examined, inspected, and marked, at the usual place for that purpose, and without giving notice of his intention of carrying the same to any other places for examination, contrary to the said acts, or the one of them, given under my hand and seal, &c. And I, the within named *G. R.* do humbly certify that the within named *J. L.* hath not been convicted before me of any offence against the said acts of parliament, or either of them, as in the said writ of *mandamus* is above alleged, or otherwise howsoever except as aforesaid; Wherefore, inasmuch as the said conviction is invalid in the law, and is not a conviction of any offence for which the mitigated penalty is payable, or can legally be levied, by virtue of any law or statute whatsoever, and inasmuch as the said *G. L.* hath not been otherwise convicted of any offence whatsoever, before me; the said justice, as within is supposed. I, the within named *G. R.* have not levied nor caused to be levied the said penalty and forfeiture in the conviction above set forth mentioned, nor any such penalty or forfeiture as within supposed or distributed the same as by the said writ I am commanded.

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HOLROYD, for the *defendant*, stated that the conviction was altogether bad, and therefore the *defendant* ought not to be compelled to proceed upon it; the conviction which ought to state an offence either upon the 39 or 40 Geo. III. c. 66. s. 10, or the 41 Geo. III. c. 53. s. 6, was clearly defective, as it neither stated that the person resided within a market town or a district, nor that the informant was appointed inspector for *Sunderland*, nor that he was inspector at all at the time, nor that the raw hides belonged to the party convicted, nor that they were flayed in the market town.

CARR, *contra*, gave up the conviction, but insisted that the court would not inquire whether it was erroneous or not; because the statute had appointed a method of redress by appeal to the sessions, and had taken away the *certiorari*, and if the conviction should turn out to be so bad, then the party would not appeal, but leave the prosecutor to levy the penalty or bring his action of trespass; but here the fact was, that the magistrate heard the evidence, and convicted *Longstaff*, and took minutes in order to draw up the conviction, and as he admits that the man was convicted, he ought to proceed to enforce that conviction.

HOLROYD here said, that the conviction was drawn up according to the evidence and the original information.

Lord ELLENBOROUGH, C. J. "The magistrate cannot be right here; I do not mean to say that there may not, however, be a venial error, and then it is right that he should stop immediately, as where by some mistake he has convicted a person improperly; but where he has once fairly convicted a man, he ought to proceed to enforce that conviction. If it is altogether a nullity, the magistrate is not bound to proceed

further, in order to subject himself to damages ; but it may be otherwise, if the conviction is merely informal."

LAWRENCE, J. " If a man has proceeded to conviction for an offence of which the party is not guilty, it would be very hard indeed to compel him to enforce that conviction by warrant, when he would be likely to have an action brought against him for so enforcing it. It is said here, indeed, that this conviction is bad, and yet that it is drawn up according to the evidence. If so, it puts the magistrate in a *dilemma*, for he has either convicted a man of an offence of which he is not guilty, or he has drawn up a conviction which is bad."

JUDGMENT, that the return to the writ of *Mandamus* is good and sufficient, &c.

THE KING *against* the INHABITANTS of BRIMPTON.
Feb. 6th.

An order of removal, dated the day of April, 1804, is good, though with a date, or at least is helped by appeal to the quarter sessions.

ORDER of removal by two justices for *Berks*, of a pauper from *Brimpton*, in the said county, to *Woolhampton*, quashed by the sessions, subject to the following case :

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George Cripps and *Edith*, his wife, were removed from *Brimpton* to *Woolhampton* by virtue of an order under the hands and seals of two justices for the county of *Berks*, dated the day of *April*, 1804, (omitting the day of the date which was left in blank.) The sessions, thinking the order defective by that omission and that they had no power to amend it, or to receive evidence of the date of the order, or of the time of the removal of the paupers, allowed the appeal with costs,

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without prejudice to the merits under another order, but subject to the opinion of the court upon the above matter.

WILSON, GIFFIN, for the appellants, argued that this order was defective in as much as it ought to appear when it was made, in order that the party might know when to appeal, because the appeal must be within a certain time.

LORD ELLENBOROUGH, C. J. "We lay down no general proposition to affect that question, but in this case there was an appeal upon which the parties acted; there could, therefore, be no prejudice to them. Upon that ground, this order of removal, though without a date, is good.

ORDER OF SESSIONS, quashing the order of justices, quashed.

STABLE against DIXON.—February 5th.

Two justices, by order under 5 Geo. I. c. 8, s. 1, directed the overseers, &c. to receive the annual rents and profits of the lands and tenements of A. B. a pauper who had run away from his family, and to certify to the next sessions, &c.: the sessions confirmed the said order, and directed them to receive the sum of 7l. 16s. rent of the rents and profits of the lands of A. B.: held upon demurrer, in an action of covenant, between the pauper and his tenant, that these orders extend only to one specific sum of 7l. 16s. and do not authorize the seizing of the annual profits from time to time. Semble, the order should always be specific, to receive so much of the annual rents and profits or, at least, for a certain time: for the purview of the statute is to seize so much thereof as shall seem necessary, &c.

DECLARATION in covenant on an indenture of lease, dated 21st November, 1791, between the plaintiff, of the one part, and the defendant of the

other part, for 18l. 10s. one year's rent, due on the 25th of March, 1803.

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PLEAS, after oyer of the said *indenture*, as to 2l. 14s. parcel of the sum demanded, a *tender*; and, as to the residue, payment; and *secondly*, as to the same residue, a set-off for money paid, laid out, and expended, &c. &c; and, *lastly*, as to 7l. 16s. parcel of the said sum, *actionem non*; because before the said 25th of *March*, 1803, aforesaid, to wit, on the 24th, day of *June*, 1801, the said *plaintiff* had gone away from his place of abode, to wit, at *Corney*, in the parish of *Corney in Com. Cumberland*, into some other county or place, and had left *Dinah Stable*, his wife in the said parish of *Corney*, chargeable on and upon the charge of the said parish, the place of their then last legal settlement, and the said *plaintiff* continued so away from his said place of abode for a long space of time, and until after the 25th day of *March*, in the said *declaration* mentioned, to wit, from the said 24th *June* 1801, aforesaid hitherto; during which time his said wife remained and continued so chargeable, and upon the charge of the said parish as aforesaid, to wit at *Ulverstone* aforesaid and it thereupon, then and there, became necessary that the said *D. Stable* should be subsisted and maintained by and at the expense of the same parish: whereupon the then overseers of the same parish, afterwards to wit, on the day and year last aforesaid, of *Ulverstone* aforesaid, in pursuance of the statute in that case made and provided, applied to *John Kirkbank* and *Joseph Berm*, esquires, then and there being two of his majesty's justices of the peace in and for the said county of *Cumberland*, and where the said *Dinah*, the wife of the said *John Stable*, was so left as aforesaid, and thereupon the said *John Kirkbank* and *Joseph Berm*, the justices aforesaid, by virtue and in pursuance of the statute in that case made and provided, then and there made their certain warrant or order in writing.

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sealed with their respective seals, directed to the church-wardens and overseers of the poor of the parish of *Corney* aforesaid, whereby after reciting in substance and to the effect following, to wit, that it appeared unto them, the said justices, as well upon the complaint and application of the church-wardens and overseers of the poor of the parish aforesaid, as upon due proof upon oath before them the said justices made, that the said *John Stable* had gone away from his place of abode at *Corney*, in the parish aforesaid, into some other county or place, and had left *Dinah Stable*, his wife upon the charge of the parish of *Corney* aforesaid, the place of their last legal settlement, and that the said *John Stable*, then had some estate, whereby to ease the said parish of their said charge, in whole or in part; they the said justices did thereby authorise and command them the church-wardens and overseers of the poor of the said parish of *Corney*, to receive the annual rents and profits of the lands and tenements of him the said *John Stable* at *Broomhill*, in the parishes of *Boottle* and *Whitbeck*, in the said county of *Cumberland*, the same being the said lands and tenements in the said indenture mentioned, and thereby demised to the said *John Dixon* as aforesaid, for and towards the discharge of the said parish of *Corney*, for the providing for the said wife of the said *John Stable*; and that with the said warrant they the said churchwardens and overseers should appear at the next quarter sessions of the peace to be holden for the said county, and certify then and there what they should have done in execution of the said warrant; and the said *John Dixon* further says, that at the general quarter sessions of the peace of our sovereign lord the king, holden next after the making of the said warrant or warrants, at the city of *Carlisle*, in and for the county of *Cumberland*, on *Monday*, the 19th of *July*, in the 41st year of the reign of our said lord the now king, before

James Clarke Sutterthwaite, William Potts, esquire and others, their fellows, justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed; the said order was, in pursuance of the statute in that case made and provided, confirmed by the said court; and the said court did then and there order the church-wardens and overseers of the poor of the said parish of *Corney* to receive the sum of 7l. 16s. rent of the rents and profits of the lands and tenements of the said *John Stable*, at *Broomhill*, in the parishes of *Bootle* and *Whitbeck* aforesaid, being the said premises so demised to the said *John Dixon* as aforesaid, for and towards the discharge of the said parish of *Corney*, for the providing for the said *Dinah Stable*, the wife of the said *John Stable*. And the said *John Dixon* further says, that under and by virtue of the said orders, he the said *John Dixon* afterwards and before the said 25th day of *March*, in the said declaration mentioned, to wit, on the 29th day of *September*, in the year of our Lord, 1802, aforesaid, to wit, at *Ulverston* aforesaid, paid to the church-wardens and overseers of the poor of the said parish of *Corney*, the said sum of 7l. 16s. the same being parcel of the said sum of 18l. 10s. mentioned in the said breach of covenant in the said declaration above assigned, to wit, at *Ulverston* aforesaid; and this the said *John* is ready to verify; wherefore he prays judgment, &c.

REPLICATION. Acceptance of the sum tendered. As to the residue, *non-payment*. As to the set-off, the *plaintiff* is not indebted to the *defendant* in manner and form therein alleged. To the last plea, protesting that the *plaintiff* was not gone from his place of abode, and had not left his wife, as in the said plea alleged,

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for replication, the *plaintiff* says that before the said 25th of *March*, 1803, to wit, on the 1st day of *October*, 1801, the said sum of 7l. 16s. in the said order of sessions mentioned, was paid by the said *defendant* to the then church-wardens and overseers of the poor of the said parish of *Corney*, pursuant to the said order of the said general quarter sessions in the said 4th plea above mentioned, to wit, at *Uloverstone* aforesaid. And the said *plaintiff* further says that afterwards, to wit, on the 25th day of *March*, 1802, at *Uloverstone* aforesaid, the said sum of 7l. 16s. was deducted by the said *defendant*, and allowed to him by the said *plaintiff*, out of the said rent in the said indenture in the said declaration mentioned, which on the day and year last aforesaid, became due and payable from the said *defendant* to the said *plaintiff*, and thereby and therewith was then and there paid and satisfied to the said *defendant* : and this the said *plaintiff* is ready to verify, &c.

REJOINDER, *precludi non* ; because true it is that a sum of 7l. 16s. being the first yearly payment under the said order, was after the payment thereof by the said *defendant*, to wit, on the 25th day of *March*, 1802, deducted and allowed by the said *plaintiff*, out of the rent in the said indenture mentioned, which on the day and year last aforesaid became due and payable, as in the said replication is mentioned ; yet, for rejoinder in this behalf, the said *defendant* says, that the said sum of 7l. 16s. in the said last plea mentioned, and so paid by him the said *plaintiff* as in that plea mentioned, was and is another and different sum of 7l. 16s. than the sum of 7l. 16s. so deducted and allowed as aforesaid, and accruing and payable subsequent to the said sum of 7l. 16s. so deducted and allowed as aforesaid, that is to say, for the second year's payment under the said order in the said plea mentioned to wit, at *Uloverstone* aforesaid, and such said sum of 7l. 16s. in the said last

plea mentioned, hath not nor hath any part thereof been deducted, allowed, or in any way paid by the said *plaintiff*. And this the said *defendant* is ready to verify; wherefore he prays judgment, if the said *plaintiff* ought to have or maintain his aforesaid action thereof against him, &c.

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To this rejoinder there was a *demurrer*; and thereupon, a joinder in *demurrer* by the *defendant*.

The points intended to be argued were stated as follows, in the margin of the *demurrer books*, pursuant to the late order of the court. "This is a *demurrer* to the *rejoinder* to the replication (sheet 10) to the last *plea in bar* (sheet 7.) The questions are, whether the order of sessions (stated in sheet 9) *does* or legally *can* extend to this annual sum of 7l. 16s. or is or legally must be confined to one sum only of 7l. 16s. Also, whether the order of two justices, set forth in sheet 8, and the above order of sessions confirming it, are not *both* void on account of the former ordering the receiving of all the *plaintiff's* annual rents and profits generally, and not being confined, as the order of sessions is, to a *particular* part or amount thereof specified in the order. These questions arise upon the statute 5 Geo. I. c. 8.

HOLROYD, for the *plaintiff*, contended that both the order of the justices and the order of sessions were void; and THE COURT called upon

WIGLEY, to support the plea. "As far as the order goes to the seising of the property, it is still a subsisting order, though it should not appear how the property so seized is to be disposed of. By 5 Geo. I. c. 8, s. 1, "Whereas sometimes men run away, leaving their wives and children upon the charge of the parish, although such persons have some estates which should ease the parish of their charge in whole or in part, it

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shall be lawful for the church-wardens or overseers where any such wife, child or children shall be so left, on application to, and by warrant or order of two justices to take and seize so much of the goods and chattels and receive so much of the annual rents and profits of the lands and tenements of such husband, father, &c. as such two justices shall order and direct for the bringing up and providing for such wife, child, or children; which warrant or order being *confirmed* at the next quarter sessions, it shall be lawful for the justices there, to make an order for the church-wardens or overseers to dispose of such goods or chattels by sale or otherwise, or so much of them for the purposes aforesaid, as the court shall think fit, and to receive the rents and profits, or so much of them as shall be ordered by the said sessions, of his or her lands and tenements, for the purposes aforesaid."

And there is a precedent in *Burn's Justice*,* of an order to seize the annual profits without mentioning any specific sum. The meaning of the statute was, that any property which such a man should leave, should be applied to the support of his family; and, therefore, if he left an orchard of only *forty shillings per annum* rent, the whole of it might be seized for this purpose; and here the order of justices is to receive the rents of the lands, or so much as may be necessary for the purposes aforesaid, and the confirmation by the sessions is to receive the sum of 7l. 16s.

Lord ELLENBOROUGH, C. J. "Do you mean to contend, then, that there is an order to receive the whole of the rents and profits for ever? I think that construction can hardly be put upon it; and if you look at the order of confirmation, you will find that it

* Vol. 3, 501, edit. 11th, 1769.

extends only to the 7l. 16s. ; for that which it does not confirm, it must be understood to reject."

WIGLEY. " If it had been an order to receive 7l. 16s. being the annual rent, from time to time, it would have been a good order ; now these orders, applying the one to the other, are equivalent to such an order ; and it cannot be requisite that the parties should apply to the sessions from year to year. For an order under the 43 Eliz.c.2, on a man to relieve his father, until the sessions order the contrary, is good ; *Jenkin's case*.* In *Rex v. Penoyer*,† an order was indeed held bad, because it did not specify how long the relief was to be paid ; but though that was one of the objections, there were two others certainly fatal, and no cause was shewn to the rule, so that that case is not decisive. Here, however, the statute contains the words annual rents and profits, and so does the order ; and both the equity of the statute and the terms of it seem to require not only that the pauper should be compelled to provide for his family out of the rents and profits, but that the order to be made should be, as this is, a continuing order to prevent the necessity of applying four times a year to the sessions to obtain a new order."

HOLROYD, *contra*. " The order contains a direction to certify to the next quarter sessions, which is of itself a plain indication that it is not intended to make a seizure for more than the sum immediately contained in the order. And the original order of two magistrates is void, whether it applies only to the rents and profits to be due before the then next quarter sessions, or whether it is construed as wholly indefinite ; for it does not ascertain the *quantum* of the relief which the parish requires, and the act does not give the two magistrates a power to seize the rents and profits ge-

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* 2 Salk. 534.

† 1 Const. 316.

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nerally, but only so much as may be necessary. By ordering the whole rents and profits to be seized, generally, the justices and the sessions have exceeded their power."

LORD ELLENBOROUGH, C. J. "Under this warrant, if a man had 5000*l.* a year, the parish might have seized the whole of it, when the actual burthen was not 5*l.* The order must specify a definite sum."

JUDGMENT FOR THE PLAINTIFF.

AVISON *against* Lord KINNAIRD and others.

Held, that, in an action by a husband on a policy of insurance on the life of his wife, the declarations of the deceased wife, as to her state of health, when ill in bed, are admissible evidence of her state of health, against the husband on a warranty of good health; for, the evidence even of medical men is founded upon the representation of the patient.

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THIS was an action upon a policy of insurance, by the defendants the directors of the *Westminster Insurance Company*, on the life of Sarah, the wife of the plaintiff, which was tried before GRAHAM, B. at the last summer assizes for Lancaster. The policy of insurance was dated the 22d of November, 1802, with a warrant that the said S. A. was in good health, and not exceeding the age of 22 years. Application was made by Avison to the agent of the insurance office at Manchester, on the 9th of November, 1802, who after having called in a surgeon at Manchester to examine Mrs. Avison, wrote up to London to effect the insurance. This surgeon, upon being called as a witness at the trial, stated that he never was more satisfied in his life; the pulse of Mrs. A. was good; and he never knew any person affected with liquor but it was discoverable upon her pulse. Other witnesses were called on the part of the plaintiff, to prove the good state of health of Mrs.

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At the time of the insurance; and on the part of the *defendant* some were called to prove that she had acquired a habit of drinking, which at that time had impaired her constitution; and she died in about six months afterwards, in *May*, 1803. An apothecary was also called who attended her on the 22d of *November*. He was called to attend her on the 15th, and he said that he found that the stomach was somewhat affected; that she took too copiously of spirits; he considered her, however, as a healthy woman, and he would not administer much medicine, and she recovered by one of those efforts of nature which result from a young and good constitution; but he thought her illness of so much importance that if she continued the habit of drinking, it would endanger her life. It appeared that she might have taken probably about a bottle of brandy a day. *Susannah Lee* said that she saw *Mrs. Avison* about a day or two after she had been to *Manchester*, which was nine miles from her home; she called on her, not knowing that she was ill. She found her in bed at eleven o'clock in the forenoon; she spoke very faintly, and said she was very poorly; that she had been to *Manchester* to get her life insured, that she was poorly when she went; that the policy would not come back from *London*, in less than ten days; and that she was afraid she should not live till it came back, and if that were the case, her husband would not get the money. The *counsel* for the *plaintiff* objected to this evidence, in the early part of it, as to the declarations of the wife, which they said should not be received for or against her husband; but the learned judge held that as the evidence of the *apothecary*, and of *Thorpe* the surgeon, who examined her at *Manchester*, were founded, in a great measure, on her representations of the state of her health; and as the general opinion of a surgeon concerning the state of the health of any person, must partly be formed

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upon the evidence of the person himself, the evidence was admissible. He then directed the jury to consider whether this *habit* of excessive drinking was formed at the time of the insurance, and whether any mischief was done by it to the constitution of Mrs. A., so that unless she abandoned it she would not be in good health. The jury found a verdict for the *defendants*; and, in last term, COCKELL, Sergeant, for the *plaintiff*, obtained a rule to shew cause, why there should not be a new trial upon a misdirection by the learned Judge, and also upon the ground that the evidence of Mrs. Lee ought not to have been received. The misdirection was said to consist in the learned judge's drawing the attention of the jury to the moral habits of Mrs Lee at the time of the insurance, rather than to her actual state of health; but, it appearing that he had left it to the jury to say whether the excessive drinking had impaired her constitution, this ground was abandoned, and cause was now shewn, upon the other ground, by

PARKE, TOPPING, and WOOD, for the *plaintiff*.
“The objection now can only arise upon the evidence which was given after the objection taken at the trial; but several sentences were taken down by the learned judge before any objection was made. It is not to be contended, that evidence of the expressions of the wife, or of a third party, are to be received in general against the husband, who is a *plaintiff* or *defendant*; but the peculiar nature of this case deserves to be considered. The question is, whether she, the wife, is in good health at the time of the insurance. Now the warranty extends from the 9th to the 22d of November; the date of the policy being on the 22d; and between those days she is found in *bed*, at an unseasonable time, and makes some representations concerning her health: and her being in bed is of itself a fact which, explained by her representations, may amount, in a certain degree,

to evidence of the state of her health, and what she says as to her being ill is only a part of the transaction or fact, which the witness observes at the time, and is called upon to prove as a mere *fact*, indicative of health or sickness. But such *facts* are always explained by the expressions of the parties at the time, and necessarily must be so; for it is an act of the party, which is indicative of and must be explained by some motive, which must be collected out of the mouth as well as out of the conduct of the party; as in the case of a bankrupt's quitting his house, it is always competent to the parties to give evidence of his own expressions to prove his motive for quitting his house; *Bateman v. Bailey*,* *Ambrose v. Clendon*.† And in these cases it is impossible to give any evidence whatever of the health of any person, without having recourse to his own declarations; for the surgeon himself can only speak from the appearance of the patient, coupled with the statement which he gives of his past or internal symptoms. In this very case *Thorpe's* evidence, which was greatly relied upon by the *plaintiff*, was founded upon such representations, and the object of the examination of Mrs *Lee* was only to contradict that very evidence; which was so opposite to the evidence of *Lee*, that it gave rise to a very strong suspicion, which was very much urged upon the trial, that the person examined by *Thorpe* was not Mrs. *Avison*, and this was the more probable, because neither the *uncle* nor the *aunt*, at whose house she was examined, were called as witnesses to her identity."

COCKELL, Sergeant, SCARLETT and RICHARDSON, *contrâ*. "The declaration of the *plaintiff's* wife, whether for or against him, cannot be admitted in evidence

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* 5 Term Rep. 512.

+ 2 Str. 1042.

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either *civilly* or criminally, *Rex v. Cliviger*;* now these declarations have a tendency to criminate the husband, for they tend to shew him to be guilty of fraud."

GROSE, J. "There the wife was called for the purpose of establishing that which would render the husband liable to a criminal prosecution."

LAWRENCE, J. "That is, upon the policy of the law, that the husband and wife might probably not live so well together afterwards; but that does not apply to this case, when the wife is dead."

But if this is to be evidence, because it explains the act of the wife at the time, the same principle will affect the case of a wife living at the time with her husband. And these declarations might at the time be untrue, and be made under the impression of some momentary resentment. And upon similar principles, Lord *Alvanley*, in the case of *Munroe v. Twisleton*,† refused to admit the evidence of the *defendant's* wife, who was then divorced from him, even as to a contract made by her for the board and lodging of an infant child, while they cohabited together, because the wife is bound to secrecy to the husband."

LAWRENCE, J. "I am very much mistaken if there are not cases in the books in which evidence of the contract of the wife, in such a matter as that, has been admitted."

Lord ELLENBOROUGH, C. J. "Lord *Alvanley's* doctrine is extremely good, but I think, it does not apply to the case before him; for in that case it was a thing in which the wife was the actual principal,"‡

* 2 Term Rep. 263.

† *Peake's Law of Evidence*, Appendix, p. xlv.

‡ 1 *Strange*, 520, *Anon.* is expressly against the decision, in *Munroe v. Twisleton*.

"Then upon the principle of that case, nothing is more likely to produce ill blood between husband and wife, than the giving evidence of declarations made against the husband, which tend to impute to him dishonesty and want of good faith in his dealings. And although it is urged, that this evidence is resorted to for the purpose of rebutting the declarations of the wife, which are the foundation of *Thorpe's* evidence, that is begging the question; for *Thorpe's* evidence was formed chiefly upon what he himself saw and observed of the then bodily health of the party; and not upon her own idle apprehensions. This being a question upon a matter of evidence, it is safer to adhere to a broad principle of law, which forbids the receiving of the testimony of a husband or wife for or against each other, than to permit that rule to be broken in upon by nice and subtle distinctions. And, even in actions by the husband and wife, in right of the wife as executrix, no declarations of the wife can be given in evidence by defendant." *Alban v. Pritchett*.†

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Lord ELLENBOROUGH, C. J. "This case appears to have been argued, by the counsel for the *plaintiff*, upon principles of a much greater latitude and importance than the scope and extent of the question really before the court, and the principles arising out of it, justly warrant. It is not now a question whether the mutual confidence between a husband and wife should be broken, and whether, by the disclosure of the testimony now disputed, the means should be afforded of wresting from the bosom of the wife those secrets which were deposited there by the husband in the unrestrained communications of family intercourse. It

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is, on the contrary, now only required that a sick person should be heard to state that which at all times patients have been admitted to state; namely, the cause, the rise and the progress of their malady, and the period at which to fix the commencement of those symptoms which mark the nature of the disorder with which they are afflicted. To this extent only and no further is the evidence in this case applied. A woman is here found in a state of bodily infirmity, and she declares that this bodily infirmity had subsisted some days before, when she went to *Manchester*. She assigns that time as a date to which to attribute the access of her malady, and is not required to give evidence of the fact of her going to *Manchester*, for that was already proved. Wherever any evidence is given of the state of a patient's health by a person of medical skill, and whenever a physician visits a patient, these questions must be put and answered: "How do you feel yourself?—When did your symptoms of indisposition first commence? or, How long have you been ill?" For it is impossible to judge of health merely from the face, the complexion, or the pulse. What then does this woman say; and what is the substance of her representations to Mrs. Lee? Why no more than this, that she was ill at the time she was in bed; that her being ill was the reason for her lying in bed so late; and that her then present illness had lasted from the time when she went to *Manchester*. But on another ground, this evidence is admissible; for if the surgeon founds his knowledge of the state of the party's health principally upon her own representation, which he must do, then this is only the cross-examination of the same witness, the wife and patient herself, as to the state of her health; concerning which she has given different statements at different times. It may be said, however, that the uncertain declarations of third parties

are never received in evidence, they not being upon oath; but that objection is not material, for there are some exceptions, and I remember a notable case of such exception. A person was attesting witness to a bond; after his death it was necessary to prove his hand writing as attesting witness; proof was, therefore, given of his death, and I was permitted to give evidence, on the other side, of a communication made in his dying moments; upon this principle, that if I had put the deed into his hands at the trial, I might have asked him the questions to which these communications would have applied. But, however, independently of such authority, if this woman's declarations to the surgeon, given at a contemporary period nearly, are received, her declarations given to Mrs. Lee shew, that, at least, she was not to be wholly believed. And, therefore, as this does not break in upon the principle of keeping inviolate the confidence of private life, for the preservation of matrimonial comfort, I think that this statement by her, nearly contemporary to her examination by the surgeon, of a fact which must be known to her particularly and personally, must be admissible."

GROSE, J. "In order to say whether the evidence is admissible, we must look at the fact, and see what is to be proved. The question was respecting the health of Mrs. *Avison* between one period of time and another. She is on a given day, found in bed at a late hour. The next question that occurs is, how she came to be in bed at that time. Then who can give an account of that but herself? She relates the circumstance of her illness, and what is the reason of her being then in bed. This is not only good evidence, but the best evidence which the nature of the case will afford. But then she goes on to state something about the insurance. However this is a conversation the whole of which shews only that she is ill at the time she was in bed, and also

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about the time of going to *Manchester*. But this is evidence, at least, upon the latter ground, which my Lord has stated. For it is evidence of what credit is to be given to her own previous representations to the surgeon. This case does not bear upon those which have been cited. This is not a question about the disputes which may arise between husband and wife, because this woman is dead. Neither is it so much evidence of a confession of any thing which affects her husband, as that the woman was actually ill at the time to which the question in dispute relates; and though part of the evidence, it is true, goes a little beyond what it ought, yet you cannot give effect to any part of the statement, without taking the whole."

LAWRENCE J. "I am of the same opinion. On the argument in favour of the *plaintiff*, it is assumed, that this evidence which is given of the conversation with the wife went to criminate her husband; that it went to charge him with having committed a fraud, or having a design to commit one; but I do not think that such an inference by any means follows. She might have thought that all she had to do was to submit herself to the inspection of some surgeon, and that, if she lived over the time when the policy came back, her husband would be entitled to recover. But let us consider the nature of this representation. A man brings an action of assault, and is it not every day's practice to examine the surgeon as to his complaints, at the time; where he was beaten, where he was wounded, and what he suffered? But it is said that though she may state her present health, yet she ought not to be permitted to give evidence of what passed when she went to *Manchester*. Now, I think, that it is not necessary to take into consideration what passed at the antecedent day, but that this is merely giving an account of her then present health. And I think the other ground taken upon the contradiction between her statements

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at different times, is also a good ground for the receiving of her evidence. For if the surgeon's account is to be taken to have gone upon her representations to him, then we may compare them with those made to Mrs. Lee; and, if we strike out the evidence of this kind both from one side and the other, which from the contradiction between them we should do, then there remains abundant evidence to shew that she was not an insurable life. But without this you first take her evidence as good in point of law, and then you say it is not good; but, I should say to the *plaintiff* it is evidence out of your own mouth."

RULE DISCHARGED.

JOHN DOR (on the demise of GILL and WIFE)
against PEARSON and others—*February 6th.*

Devise of lands to A. and B. two sisters, and their heirs for ever, upon this condition that, in case they or either of them shall have no lawful issue, they or she having no lawful issue, shall have no power to dispose of her share, except to her sister or sisters, or to their children; and all the rest, &c. of my real, &c. estates, &c. not herein before disposed of, I give to the said A. and B. their heirs, executors, and assigns; Held, to be a devise in fee with a condition in restraint of alienation, partially, and that for breach thereof by levying a fine to the use of C. a stranger, the co-heiresses of the testator may enter; the reversion therein not passing by the residuary devise to A. and B. Held also, one co-heiress tenant in common may bring an ejectment for her share without the rest.

EJECTMENT for the moiety of an estate in the parish of *Ackworth* in the county of *York*, upon the demise of *John Gill and Hannah his wife*, on 19th of *January*, 44 *Geo. III.* *Plea*, not guilty; tried at the last assizes at *York*, before *CHAMBRE, J. VERDIER* for the *plaintiff*, subject to the opinion of this court, upon the following case, viz. *John Collett* being seised

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in fee of the estate in question, duly made his will, dated 13th of *January*, 1787, and thereby devised as follows, that is to say, *First*, I order and direct that all my just debts, legacies, annuities, and funeral expences be paid and discharged by my executrix hereafter named, out of my real and personal estates, and I charge and make the same subject thereto. The testator then devised several annuities and made several personal bequests, after which the will proceeded thus:

“I give and devise unto my two daughters, *Anne Collett* and *Hannah Collett*, all my messuages, lands, tenements, and hereditaments, at *Ackworth*, or elsewhere, in the county of *York*, subject to the several legacies and annuities herein before given by this my will, and made chargeable thereon; *To hold* to them my said daughters, *Anne Collett* and *Hannah Collett*, their heirs and assigns, for ever, as tenants in common, and not as joint-tenants; upon this special proviso and condition, that, in case my said daughters *Anne* and *Hannah Collett*, or either of them shall have no lawful issue, that then, and in such case, they or she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister and sisters, or to their children. All the rest, residue, and remainder of my real and personal estates, goods, chattels, and effects, not herein before disposed of, I give, devise and bequeath the same unto my said daughters *Anne Collett* and *Hannah Collett* their heirs, executors, and administrators, and do constitute and appoint them joint executrixes, of this my last will and testament, revoking all former wills and declaring this to be my last will and testament. The testator, *John Collett*, shortly after making his will died seised in fee of the estate in question, leaving no son, but 5 daughters, *Mary*, then the wife of *D. Unwin*, since deceased; *Anne*, afterwards the wife of the defendant, *J.W.* also since deceased: *Frances*, then the wife of

James Brinion, also since deceased ; *Margaret*, then the wife of *Richard Cuttle*, now living ; and *Hannah*, afterwards the wife of the lessor of the *plaintiff John Gill*, also now living. That *Anne*, the wife of *James Wait*, never had any issue, but all the other four daughters, have had issue, which are now alive. That, upon the death of *John Collett*, the testator, his said daughters *Anne* and *Hannah* entered upon his real estates. That, soon after, *Hannah* married *John Gill*, the lessor of the *plaintiff* ; and *Anne* married the *defendant, James Wait*. The *defendant, James Wait*, has for some years enjoyed one moiety of this estate in right of *Anne* his said wife, and rented the other moiety of the *defendant, John Gill* and *Hannah* his wife, as tenant from year to year ; the said *defendants* are tenants to the said *James Wait*. The said *James Wait* and *Anne* his wife being in possession of the said estate in 1799, duly levied a fine, *sur conuzance de droit come ceo*, &c. of a moiety thereof, and, by indenture duly declared the uses thereof to be to the use of the said *Thomas Pearson* and his heirs, in trust for the said *James Wait* and his heirs, and assigns for ever. The said *Anne Wait* died about a year ago, without having disposed of her share in the said estate, otherwise than by the said fine and indenture ; and never having had any issue. Since her death, and before the day of the demise laid in the declaration the said *John Gill* and *Hannah* his wife duly made the entry to avoid the said fine.

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Question, whether the lessor is entitled to all or any part of the moiety of the said estate devised to the said *Anne Wait* as aforesaid ?

The lessors of the *plaintiff* contend that they are entitled by virtue of the residuary devise in *John Collett's* will to the moiety in question, notwithstanding the fine levied by *James Wait* and his wife, and the

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declaration of the uses thereof; the disposition thereby intended to be effected being contrary to the condition in the will, the said *Anne Wait* never having had issue. Or, if they are not entitled to the whole of the moiety they are entitled to one-fourth part thereof in right of the said *Hannah*, as one of the co-heiresses of the said *John Collett*. The *defendants* contend, that the first residuary devise passed either an estate-tail or an estate in fee, upon a condition not since performed, to *Anne* and *Hannah Collett*, as tenants in common; and that as to *Anne's* interest, the estate tail, if any, being now spent, and the condition, if not repugnant, not being performed, the last residuary devise would take place upon the death of *Anne*, and the joint-tenancy created by that devise would be barred and her interest pass by the fine levied, and the declaration of the uses thereof to *James Wait* or *W. Pearson* his trustee.

This case was argued in *Michaelmas term* last by *WOOD* for the *plaintiff* and by *LAMBE*, for the *defendant* as follows.

For the *plaintiff*. "The *plaintiff* is entitled to recover; for the alienation made by levying a fine is void, under the restraint of alienation contained in the will; which, being only a partial restraint, is good in point of law. *Littleton*, s. 361. "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void." "But if the condition be such that the feoffee shall not alien to such an one, naming his name, or to any of his heirs or of the issues of such a one, &c. or the like, which conditions do not take away all the power of alienation from the feoffee, then such condition is good." That is precisely this case; the general power is only restrained upon a condition not to alien except to certain persons. The alienation is then a forfeiture; and, thereupon, by the residuary clause, the lessor of the *plaintiff*, *Hannah Gill*, takes

the whole of that moiety ; but, if that residuary clause does not apply, then for the same reason, she takes the fourth part of it, as one of the four co-heiresses of her testator."

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For the defendant. " Without questioning the doctrine that a partial restraint of alienation is not prohibited by law, yet this condition is void, as being inconsistent with the nature of the estate devised to the *lessor* of the *plaintiff*, and her co-devisees. The testator directs his debts and funeral expences to be paid out of his real and personal estate, which is inconsistent with this condition ; because the devisees must have an unqualified fee, and not merely a partial one, in order to pay the debts out of the estate. If it be inconsistent with the nature of the estate, no cases can be wanting to shew that it is void. But, even if it be not inconsistent with the estate, yet, under this deed and fine, the *defendants* are entitled to hold the estate. The estate first devised is given to the devisees as tenants in common, and not as joint-tenants, and, therefore, there can be no survivorship under that devise to *Hannah Gill*, nor can she thereby be entitled to any thing. Now the estate devised must either be an estate tail, which is now spent, so far as regards her ; or it must be an estate in fee, on condition of having issue : Then by the next clause the testator gives all the residue and remainder of his said estates to his said daughters, *Hannah Collett* and *Anne Collett* and their heirs. And supposing the first clause out of the question, they would take this estate as joint-tenants ; and so also they take as joint-tenants by the residuary clause ; and the operation of the fine is only to destroy the tenancy in common, and make a joint-tenancy between them, and so to give it to the husband and his heirs under the deed to lead the uses. That fine would pass future as well as present interests, she and her husband

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having then a sufficient estate in the premises for the fine to operate upon, so that the joint-tenancy being barred, it will go according to the deed to lead the uses."

LAWRENCE, J. "Would not the effect of the fine be this, that it would sever the joint-tenancy under the residuary devise in the moiety of *Hannah Gill*? and would not the other devisee then, in case they have no issue, have a tenancy in common, and not a joint-tenancy in that moiety? Is not the effect of the fine to sever the joint-tenancy in this moiety?"

LAMBE. "The last devise is of the whole, and not of separate moieties, so that the fine which severs the joint-tenancy severs it as of the whole, and not as of the moiety. The *plaintiff* is not entitled to recover the fourth part of the moiety. The co-heiresses are only entitled to recover *all* as parceners, and one cannot sever from the other; for if the co-heiresses are to take the benefit of the condition, they must all join, or it must appear that the other co-parceners have dissented. Not that an actual entry for the condition broken must be made by all, but no person except the heir can take advantage of this condition without some dissent. *Co. Litt.* 214, s, 347. 'No entry nor re-entry can be reserved or given but only to the donor or feoffor, or their heirs.' *Ibid.* 215: 'The grantee of part of the reversion shall not take advantage of a condition.' This condition then descended to the heirs at law, and whatever descended to the heirs at law passed, and was barred by the fine."

LAWRENCE, J. "You say that it ought to be proved upon the trial that all the coparceners took advantage of the condition; now that may have been proved in this case. A partial restraint of alienation is good, but is it

quite so clear that a condition that one shall not alien to any body but A. B. is good? In *Bridgman*, 137, there is an argument that a restraint of alienation to any body but I. S. is not good."

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WOOD, in reply. "Under this will, each of these two daughters took an estate in fee, in the first instance, subject to this condition. The fine and deed to lead the uses are mere nullities, and then the lessor of the *plaintiff* under the residuary clause, takes the whole of the moiety, as surviving joint-tenant. But if the residuary clause does not attach upon this, then the lessor of the *plaintiff* is entitled to one-fourth, as one of the co-heiresses of *Anne Wait*. And as they are coparceners, and therefore tenants in common, it is not necessary that they should all join in bringing an ejectment.

LORD ELLENBOROUGH, C. J. "It is not contended that they should all join, but that if this person brings an ejectment alone, the rest should have testified their dissent."

LAWRENCE, J. "This need not, perhaps, be considered as a breach of a condition, but rather as a limitation of an estate. This is the case of a will, and we should endeavour to construe this sort of devises as conditional limitations; and then the estate does not require an entry to determine it, because the estate determines of itself, upon the happening of the event." Here he cited 1 *Salk.* 239. *Tomlinson v. Dighton*. And Lord ELLENBOROUGH, C. J. having made some observations upon the manner in which the devise might be construed as a conditional limitation; LAWRENCE, J. added, "May it not be an executory devise to *Anne Collett* in fee if she shall have children; and if she has such children, then an executory devise over to such children as she shall appoint?"

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LAMBE. "Then will it not operate as an estate-tail?"

LAWRENCE, J. "It seems rather given to such of them as she shall appoint."

LAMBE. "Then, not having had children, and there being no appointment, the devise over will take place, and that will be barred by the fine."

Lord ELLENBOROUGH, C. J. "No—there is no devise over, and there is very great question whether a fine can operate on such an uncertain interest."

Cur. adv. vult.

In this term, Lord ELLENBOROUGH, C. J. asked if the parties were willing to admit the ouster, which was assented to, and on this day judgment was delivered, to the effect following, by:

Lord ELLENBOROUGH, C. J. "This was an *ejectment* brought to recover possession of a moiety of premises in Yorkshire, on the demise of *John Gill*, and *Hannah*, his wife; a verdict was given for the *plaintiff*, subject to the opinion of the court on a special case. The case states, that *John Collett* was seised in fee of the premises, and that he made his will on the 19th of *January*, 1787, and after bequeathing several pecuniary legacies to three out of his five daughters, he devised, in manner following: 'I give to my two daughters, *Anne Collett*,' who became the wife of *James Wait*, under whom the *defendant* claims, 'and *Hannah*, wife of *John Gill*, all my messuages, tenements, or hereditaments, subject to the legacies, &c. herein before given, to hold to them and their heirs and assigns, as tenants in common, and not as joint-tenants, on this special condition, that in case my said daughters or either of them shall have no lawful issue, then in such case they or she having no lawful issue as aforesaid, shall have no power to dispose of her share of the estate, except to her sister and sisters, or to their

children; all the rest of my estate I give to the said *Anne Collett* and *Hannah Collett*, their heirs, executors, and administrators.' The testator shortly after died seized in fee, having no son, but five daughters, *Mary* since deceased; *Anne* wife of *James Wait*; *Margaret*; and *Hannah* the wife of the lessor of the plaintiff *John Gill*. On the death of *Collett*, his daughters, *Anne* and *Hannah* entered on the estate, and soon after married. *James Wait* has enjoyed a moiety in right of his wife, and the other moiety as tenant for years. Being in possession of the estate, in 1799, they levied a fine *sur conuazance de droit* of a moiety; and by indenture declared the use to be to *Thomas Pearson* and his heirs, in trust for *J. Wait* and his heirs. *Anne Wait* died a year ago without disposing of the estate, and there has been an entry to avoid the fine. The question is, whether the lessor of the plaintiff is entitled to all or any of the moiety devised to *Anne Wait*? In this case there are three questions, first, whether the condition annexed to the estate of *Anne* and *Hannah Collett* be good in law; secondly, as to the effect of the residuary clause; and thirdly, whether the ejectment can be supported by one of several co-heiresses? We think the ejectment good according to the case of *Daniel v. Uply, Latch*. 134,—139. In that case the judges did not agree as to the effect of a devise to a wife in the following words, 'I give my house to my wife *Agnes*, to dispose at her will and pleasure, and to give it to which of my sons she pleaseth;' *Jones*, justice, thinking it gave an estate for life only, the other judges thinking it gave a fee-simple; yet it was not doubted that she might have given a fee-simple to the sons of the testator under the power to convey to the sons of the devisor; and in case she conveyed to any one else, the heir might enter for the condition broken, if it did not give more than a life-interest. *Latch*, 137. *Doderidge*, J. conceived she had the fee; with a power or

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condition that if she did alienate, it must be to one of her testator's children ; that it was an estate in fee, with liberty to alienate only to the children. But in Justice *Dalison's Reports*, 58, a devise to a wife of land" to dispose and employ the same to herself and her children, at her will and pleasure, " was held by *Dyer, Weston*, and *Walsh*, to be fee-simple; with a condition that she could not give it to a stranger, but must either hold the land herself or give it over to one of her children."

These cases shew that the devise in question may operate as a devise on condition ; for breach of which in levying a fine, the heir at law will be entitled to enter, if the residuary clause does not operate as a devise over ; and we think, that the residuary clause cannot be considered as a devise over. For it did not seem to be in contemplation of the deviser to make a devise over of these premises, but to dispose of those things that had not been previously disposed of by his will. This being the case, it comes to the question, whether one coheir can enter ; and it seems he may, for in an assize, as it appears from 2 *Broke's Abridgment*, 37, which refers to title *Remitter*, *placitum* 16 ; it was held by *Hales*, justice, that " if a discessor infeoff four persons, on whom the *disseissee* re-enters, and one of the *feoffees* enters again, and the *disseissee* brings assize, he cannot plead joint-tenancy with the other three ; for, by the entry of the *disseissee* their interest was defeated, and therefore the re-entry of the one will not *remit* the others, for the right is determined ; but where *four* coparceners or others are lawfully seised, and then are disseised the entry of one will *remit* all the others ; for the entry is lawful and the right remains, and in the other case *à contrà* because, the right, the interest, and the possession are defeated by the lawful entry."* Also

* 2 Bro. Ab. 202, a. (16.).

"if lands come to two in common, and one enter into them generally, it shall be an entry for both."* So, "if a man devises certain annuities to his four sons out of certain lands, and devises over, that if the heir does not pay the said annuities, his said sons shall have the land to them and the survivor of them; and then if the annuities be not paid, and one son enters generally, it shall be an entry for all the sons as joint-tenants. H. 42 Eliz. B. R. *Parslowe v. Parker*, 1 Roll. Ab. 741. 71. On the whole, we think that the condition annexed to the estates devised to *Anne* and *Hannah Collett* is good, and that the residuary clause has no effect on the premises in this ejectment.

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JUDGMENT for one-fourth of the share which was devised to *Anne Wait*.

The KING against SOUTHERTON.—February 7th.

Information at common law, that *A.* wrote to *B.* and informed him "that he was applied to to prosecute him, upon the stamp acts, and that he *A.* had informed the parties the prosecution must be carried on by the public officer, and requested *B.* to write to him, *A.* and he would make the best terms in stopping it," without averring that *B.* had been guilty of any offence for which such prosecution would lie, and when *A.* did not actually extort any money: held bad; for the bare threat was too weak to extort money, and therefore was no offence at common law, but was punishable under the statute 18 Eliz. c. 5, s. 3.

6 B. 126. S.C.

THIS was an information against the defendant for attempting to extort money by promising to procure pretended prosecutions to be stayed; the information contained several counts, of which the following were the most material:

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* 1 Roll Abr.

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4th count.—That the said *John*, afterwards, to wit, on the 23d day of *August*, in the year of our Lord, 1803, to wit, at *Taunton*, in the county aforesaid, wickedly and corruptly intending to abuse the laws made for the protection of his said majesty's revenue, and the support of his majesty's government of this realm, to the oppression of the subject of this realm, and to his own corrupt gain and advantage, and thereby to bring the same into great hatred and contempt, and without any purpose of causing the same to be carried into legal execution for the good of the realm, did send and cause to be sent a letter, bearing date the day and year last aforesaid, to one *Richard Allen* and to one *William Allen* to the tenor and effect following (that is to say), "Sir, I (meaning the said *John*) am applied to prosecute, (meaning the said *John* was applied to, to prosecute, an information against you (meaning the said *Richard Allen* and *William Allen*) for selling certain medicines without stamps; I (meaning the said *John*) have told the parties that all such informations must now be *prosecuted*, meaning prosecuted, by the public officer, and have advised them to let me, meaning the said *J.* write to you (meaning the said *Richard Allen* and *William Allen*) on the subject, and hear what you (meaning the said *Richard Allen* and *William Allen*) have to say. If I (meaning the said *John*,) can be of any service to you (meaning the said *Richard Allen* and *William Allen*) in stopping them you (meaning the said *Richard Allen* and *William Allen*) will write me (meaning the said *John*) accordingly, and I (meaning the said *John*) will get the best terms I can, and am Sir, your obedient servant, *J. Southerton*, (meaning the said *John Southerton*) *Wellington, Somerset*, 23d, 1803." With intent to extort and procure money from them the said *Richard Allen* and *William Allen*, for the purpose of preventing the said prosecution in

the said letter alleged to be intended against the the said *Richard Allen* and *William Allen*, in contempt of our lord the king and his laws, to the evil example of all others in like case offending, and against the peace of our lord the king, his crown and dignity. 5th count.—And the said Attorney-General who prosecutes as aforesaid, further gives the court here to understand and be informed, that the said *John*, afterwards (to wit) on the same day and year last aforesaid, at *Taunton* aforesaid, in the county aforesaid, wilfully and wickedly intending to injure them the said *Richard Allen* and *William Allen*, and to abuse the laws of this realm to the oppression of his said majesty's subjects, and to turn the same to his own corrupt benefit and advantage, unlawfully, wilfully, and corruptly did attempt to extort and procure from them the said *Richard Allen* and *William Allen*, a large sum of money, to wit, the sum of 10l. by, then, and there, and at divers other times between that day and the day of exhibiting this information, threatening them the said *Richard Allen* and *William Allen*, that a prosecution should be commenced against them, under and by virtue of the statutes in that case made and provided, for having sold a certain medicine, to wit, *Friars Balsam*, without a stamp, unless they the said *Richard Allen* and *William Allen* should pay the said sum of money, to wit, the said sum of 10l. for the purpose of preventing such prosecution from taking place, to wit, at *Taunton* aforesaid, in the county aforesaid, with intent to gain corrupt advantage to himself, to the great vexation and oppression of his said majesty's subjects, and thereby to bring the laws made for the support and protection of his majesty's revenue into great hatred and disrepute, in contempt of our lord the king, and his laws, to the great damage of them the said *Richard Allen* and *William Allen*, to the evil example of all others in the like case offending,

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and against the peace of our said lord the king, his crown and dignity. 14 Count. And the said Attorney-General who prosecutes, &c. further gives the court here to understand and be informed that the said *John Southerton*, afterwards, to wit, on the same day and year last aforesaid, at *Taunton* aforesaid in the county aforesaid, wickedly and corruptly intending to abuse the laws made for the protection of his said majesty's revenues and the support of the government of this realm, to the oppression and vexation of his said majesty's liege subjects, and to the procurement of unjust and corrupt gains and advantages to himself, and thereby to bring the same into great hatred and contempt, and without any purpose of carrying or causing the same to be carried into legal execution for the public good, wickedly, wilfully, and unlawfully did threaten one *Richard Pratchett* with the prosecution of an information against him the said *Richard Pratchett* for selling certain medicines without stamps, with intent to extort money from the said *Richard Pratchett*, to induce him the said *John Southerton* to prevent any such prosecution from being commenced against him the said *Richard Pratchett*, and to procure corrupt gain and advantages to himself, to the great oppression of his said majesty's liege subjects, in contempt of our said lord the king and his laws, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity. 15 Count And the said Attorney-General, who prosecutes, &c. further gives the court here to understand and be informed that the said *John Southerton*, afterwards, to wit, on the same day and year last aforesaid, at *Taunton* aforesaid, in the county aforesaid, wickedly and corruptly intending to abuse the laws made for the protection of his said Majesty's revenues, and the support of the government of this realm to the oppression

and vexation of his said majesty's liege subjects, and to the procurement of unjust and corrupt gains and advantages to himself, and thereby to bring the same into great hatred and contempt, and without any purpose of carrying or causing the same to be carried into legal execution for the public good, if his own corrupt ends could be attained, wickedly, wilfully, and unlawfully did threaten one *Richard Pratchett*, with the prosecution of an information against him the said *Richard Pratchett*, for selling certain medicines without stamps, with intent to extort money from the said *Richard Pratchett*, to induce the said John Southerton to prevent any such prosecution from being commenced against him the said *Richard Pratchett*, and to procure corrupt gains and advantages to himself, did then and there unlawfully receive the said sum of ten pounds for the purpose of preventing such prosecution from being commenced against him the said *Richard Pratchett*, to the great oppression of his said majesty's liege subjects in contempt of our said lord the king, and his laws, &c. The defendant was convicted on the above information, at the last assizes for the county of Somerset; and

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In Michaelmas term last, BURROUGH, for the defendant, moved in arrest of judgment, and took several objections, viz. that in the fourth count the word *said* referred to a letter written by the defendant, whereas two different letters were previously set out in the information; and that the information was not laid *vi et armis*. But he principally relied upon the following, viz. that the bare threat of prosecution was not, at common law, an offence for which this information would lie; because the party must know, that, by the law as it now stands, the defendant could not prosecute as a common informer; and the parties threatened, knowing also that they were innocent, could not be

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worked upon by such a threat to comply with this demand; and that the 15 count should have been on the 18 *Eliz.* c. 4. A rule to shew cause having been obtained, cause was now shewn by

THE ATTORNEY GENERAL, GIBBS, LENS, *Serjeant*, and DAMPIER, for the crown. "Assuming that the offence of actually *extorting* money, by the means used in this case, is indictable at common law, as a misdemeanor, then any act done towards the commission of that same offence is also a misdemeanor; *Reg. v. Schofield*;* the writing of this letter is such an overt act of attempting to commit such a misdemeanor, and therefore indictable. The actual procuring of the money is indeed the chief injury to the party; but the crown is injured by the bare attempt, for the whole policy of the penal clauses in the stamp act is evaded, and the reward, which is the inducement to the enforcing of them is diverted from its proper course to be the subject of this fraud."

LORD ELLENBOROUGH, C. J. "Have you not the means of prosecuting specially, under the statute 18 *Eliz.* c. 4? By that statute he is punishable if he takes a promise of reward."

ATTORNEY-GENERAL. "Although that statute does provide a special remedy, yet this being an offence at common law, is still indictable at common law. Or even though it were not an offence at common law to extort money by this means, yet when it is made a misdemeanor by statute, the attempt to commit that misdemeanor becomes indictable, at common law. That statute, indeed, added to the common law, by making it a misdemeanor to compound a penal action even of a private nature; which would not have been indicta-

* 1 *Caldecot*, 357.

ble at common law. But to compound a penal action of a public nature is indictable at common law ; for *Hawkins* says, no misdemeanor of a private nature is indictable, unless it somehow concerns the king. In *the Queen v. Woodward*† there was an indictment against *several* for intending to defraud, A. of his money, stating that they threatened to send him to *Newgate*, under a warrant for felony ; the record of the indictment has been since examined, and it states that they got the man into their custody under colour and pretence of a warrant alleged to have been sued out, and by force of threats they compelled him to give them money ; there was a demurrer to this indictment, but it was held good : and if the objection will apply here, that it is not stated that the party was guilty and liable to be sued, so in that case the same objection would have occurred that it was not alleged that the party threatened was guilty of a felony. And if this objection could prevail, it would be an offence only to threaten a guilty man with prosecution, and not to threaten an innocent man. In *Serlested's* case,‡ “ one *Proud*, being a soldier, under *Hammond*, his captain, one S. under pretence that he had power to discharge soldiers, obtained money of him ; and it was objected that in fact he could not have power, for only the *general* and the *captain* could have power to discharge soldiers ; but the court said that this made the *deceit*, namely, that he had the power, and so the indictment was good.” Here it is said that the offence imputed to the prosecutor by the *defendant* should appear to be such an offence as is the subject of a penalty, and that it is not properly described as coming within the stamp act, 43 *Geo. III.* c. 43, because it does not state that the medicine was sold without a stamped

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† 11 *Mod.* 137. ‡ *Latch*, 202.

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label, or that it was a medicine within that act; but it is stated to be sold without a stamp, and, if so, must necessarily be without a stamped label; and it is expressly stated to be *Friar's Balsam*, which is included in the schedule of the 43 *Geo. III.* c. 43. This is sufficient certainty, and it can hardly be required that the threat itself should be stated by the *defendant*, in all cases, with the accuracy of a special pleader."

LAWRENCE, J. "It is not requisite that the original threat should be so precise. It would be extraordinary, indeed, if the *defendant* should threaten in the language of a special pleader; but the ground of the objection is, that if he states that which is evidence of his intention to prosecute for a certain offence under the statute 43 *Geo. III.* c. 43, then you are to state in your indictment with technical accuracy what was the nature of the offence which he falsely charged you with."

The *counsel* for the crown then cited *Rex v. Mackartey*,* *Rex v. Lara*† *Rex v. Higgins*,‡ *Rex v. Turner*§ to shew that the offence stated was a misdemeanor, though not laid by way of conspiracy; and further, that from the authority of the *King v. Birch*,|| it need not be laid *vi et armis*.

BURROUGH, *contra*, was stopped by the court.

LORD ELLENBOROUGH, C. J. "In order to make this an indictable offence at common law, the threat to extort money ought to be of such a nature as to overcome the firmness of a man of ordinary courage and fortitude, and to deceive the prudence of a vigilant man. But this is only a threat to become the means of instituting a prosecution against the party; and though I do not mean to say that the *defendant*

* 2 *Lord Raym.* 1179.

§ 1 *Sid.* 211.

† 6 *Term Rep.* 565.

|| 4 *Term Rep.* 608.

‡ 2 *East*, 5.

would not have been amenable to the law under the last count, if that had been framed upon the statute 18 Eliz. c. 4; yet to obtain money by such a threat, which in its nature is too futile to influence men of ordinary prudence and firmness, is not an offence at common law; and, if it is to be considered an offence under the statute, it ought to have been stated in the 15th and last count as a threat to inform against him, *contra formam statuti*. But laying the statute out of the case let us consider the authorities which have been cited. In the *Queen v. Woodward*, it has been urged that the threat of a pretended warrant to convey a man to *Newgate* has been considered a threat of sufficient force to support an indictment; but is that precisely the case? Was it merely a threat of a pretended warrant? Nay, was there not such an actual *duress* as would have avoided any bond or security which had been given under such circumstances? The law distinguishes between mere cases of threats of personal violence, which may not induce a firm man to yield to it, and such threats of bodily harm or danger of life as amount to actual *duress*; and under every view of that case there were such circumstances of coercion as might have amounted perhaps to robbery. It was not merely the procuring of an action to be brought against him, but the proceeding to take him to *Newgate*. As to the case in *Latch*, of the *King v. Serlested*, the circumstances of it are not very fully stated; but it is reasonable to suppose that there were strong circumstances of deception amounting to a legal *deceit* and *fraud*. So in the case of the wine, in the *King v. Mackartey*.* But this is merely a

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* That was an indictment against two for bargaining to barter with I. S. a certain quantity *vini pretensi* as good and new *Lisbon* wine, for a quantity of hats of I. S. of the value, &c. and affirming *vinum pretensum predictum fore real new Lisbon* wine, when, in fact, it was not; and for that one of

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threat of some personal inconvenience to the party ; and at common law, unless it can be considered as a threat of *duress* or violence, or, it be a fraud against which ordinary prudence cannot guard, it is not indictable ; and here it is not averred that the offence had been committed by the prosecutor, so that he could be proceeded against. These counts are, therefore, not to be supported in law ; and it will not be necessary to consider the other objections which have been made to them."

GROSE, J. " I doubted of this case, when the case of the *King v. Woodward* was mentioned, but they now appear to be very distinguishable ; for that was a case of actual *duress*, but this is a mere threat to put a man to a personal inconvenience by bringing an action."

LAWRENCE, J. " I am of the same opinion. Though morally considered, this is as bad as if the *defendant* had put a pistol to the man's breast and taken the money out of his pocket by violence, yet it is not an offence of such public inconvenience, from the very nature of the threat, and the deception which have been made use of, that can become the subject of a public prosecution. It has been argued, with great force, by the *Attorney-General*, that, if this money had not gone into the pocket of the defendant, it would have been appropriated to those purposes of encouraging the detection of frauds upon the revenue, for

them *supervacuum*, that he was a merchant of *London*, and dealt as such in *Lisbon* wines, and then and there personated a merchant of *London* in *Lisbon* wine ; and for that I. S. believing their pretensions delivered, to them a quantity of hats of the value, &c. The offence was not laid as a *conspiracy*, but it was charged that the pretended wine was not drinkable nor wholesome, &c. 2 Lord Raymond, 1179.

which the penal clauses of the revenue laws are designed: but, in order to support that argument, it ought to have been shewn, that the *Allens* were guilty of an offence against those laws. For if they were not, none of this money could have gone into the public purse or have been so meritoriously applied. If the *defendant* had indeed received *such* money I do not say that it would not be a misdemeanor. It was argued by Mr. *Dampier* and also by the *Attorney-General*, that this was an attempt to commit a misdemeanor, and that there is no difference between an attempt to commit a misdemeanor which is made so by statute and a misdemeanor at common law: and I agree with them in the principle; but this indictment is defective, because it does not charge him with an attempt to commit a misdemeanor; and the last count is not *contra formam statuti*. But look at the other counts. It is taken for granted in the argument that he attempted to commit a misdemeanor at common law; but I do not consider that this is a misdemeanor at common law. For the law does not protect men against those frauds which common prudence will guard against; and in the *Queen v. Jones*,* where a man obtained money under the pretence of being sent by another to receive it, but without a false token, it was said pretty strongly, "we do not indict one man because another man is a fool." So, also in a case in 5th *Modern* one *H.* came to the wife of one *B.* and made her believe that he had got a sheep which he had sold to *B.* and obtained a sum of money, and the indictment was quashed. So where one said, "unless another would give him a sum of money, he would tell the *Attorney-General* of it," and the matter was not such a thing as the *Attorney-General* could prosecute, it was held bad. And if a

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* 1 *Salk.* 379. 2 *Lord Raym.* 1013.

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threat is the means of obtaining money it must be such a threat as would operate upon a man of ordinary firmness. So in the old law, where an entry is to be made on the lands, you must actually go upon the lands, unless forbidden or kept off by force or threats of bodily harm and fear of life; but it must be such a threat as may operate on a firm man, or one who is as Lord Coke says, *vir fortis*, and a threat to do mischief to a man's house will not do, to make a continual claim good instead of an entry. So in *duress per minas*, in order to avoid a deed, a mere threat of any thing but personal violence, and a fear of loss of life, of *Mayhem* or of loss of limb, does not amount to that sort of *duress*.* And that seems to shew that the case of the King against *Mackarty*, was an indictment for a fraud or for duress of imprisonment at common law, and not applicable to this case. If the parties there had got out a warrant, then the using it for so wicked a purpose was clearly a misdemeanor; and if not, still it was a gross offence, for after they got him into prison they threatened to put him in the pillory for perjury, and surely that was a threat which might have operated on a man of a very firm mind.

LE BLANG, J. was absent.

JUDGMENT FOR THE DEFENDANT.

PARR against ANDERSON.—February 7.

Query, whether under a liberty to take a letter of marque, the vessel insured shall have liberty to chase any ship which she may meet in the course of her voyage, for the purpose of hostile capture, and not for mere defence; and whether the usage of merchants has determined that such is or is not the meaning of such a liberty?

* Co. Lit. 253, b. 1, Black. Com. 131. Bracton, book 2, c. 5.

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THIS was an action upon a policy of insurance on the ship *Mercury*, at and from *Liverpool* to all her ports and places of trade on the coast of *Africa*, and the *African Islands*, and during her stay on the said coast, &c. and at and from thence to her final port, and her place of sale and delivery and discharge in the *West Indies*, and in *America*, with a liberty to proceed for and sail to and touch and stay at any ports and places whatsoever, and to land, discharge, and take goods from any ship or ships, &c. to any place whatsoever. The policy was signed before the commencement of hostilities, and afterwards a license was signed by the under-writers to sail with a letter of marque. Loss by perils of the seas. At the trial, before Lord ELLENBOROUGH, C. J. at the sittings after *Trinity* term, 1804, at *Guildhall*, it appeared that after having got to her place of destination in *Africa*, she fell in with the *Sparrow*, a vessel bound to *Quebec*, the master of which came on board the *Mercury*, and after being some time in company two vessels *hove* in sight, namely, a corvet and an enemy's vessel; that they chased and captured her without any deviation. But this capture, which was on the 20th of May, formed no part of the question at the trial. After this they saw a lugger within gun shot sailing across their course. The *Sparrow* was then about three leagues to leeward. The *Mercury* then altered her course about half a point for a quarter of an hour, on the 5th of *July* being about 46° or 47° south latitude; they went then westward, but their fair course would have been south; they steered, however, between the south and the south-west, and still kept their course, and afterwards pursued their course to the *Havannah*, after which the loss accrued. The question was, whether this was a deviation, and Lord ELLENBOROUGH, C. J. in his directions to the jury, requested them to consider whether this was a chasing for the purpose of hostile capture, and not for the pur-

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pose of defence ; and said that the liberty to take a letter of *marque* only extended to permit the ship insured to take the proper means for her own safety, and did not give the assured a liberty of ingrafting upon a commercial adventure any right to chase on an adventure for the purpose of hostile capture, though it might permit them to take any vessel which fell in their way. Under this direction, the jury found a verdict for the *defendant*.

In last *Michaelmas* term, a rule was obtained to shew cause why there should not be a new trial, on the ground that having a letter of *marque*, gave a liberty to the assured to chase any ship which was seen by the *Mercury* in her course, although it did not give her a right to cruise, and either quit her course or delay and wait during her course for the purpose of searching for prizes ; and the case of *Jolley v. Walker*,* which was cited at the trial, was now much relied upon. And it was said that otherwise the license to carry a letter of *marque* would be nugatory, for any ship must be at liberty to defend itself, and sometimes the appearance of chasing might of itself be the means of defence ; and that otherwise the assured, though she might so disable a ship as to have it in her power to capture her, yet would be compelled to let her escape and possibly give her an opportunity of repairing her damage, and renewing the attack with success, because the vessel insured could not move a cable's length out of her course to take her.

On the other side, it was contended that this entirely altered the nature of the voyage, and it was admitted that if the chasing was found to be unnecessary to the defence of the vessel, it might be within the liberty, but that the jury had found that it was not for the purpose of defence.

* *Park's Insurance*, 299, M. S

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Lord ELLENBOROUGH, C. J. "This is a motion for a new trial in an action tried at *Guildhall*, the sittings after last term. It was an action on a policy of insurance in the ship *Mercury*, at and from *Liverpool*, to the place of her trade on the *African* islands, and at and from thence to the *West Indies*, 'with liberty to carry letters of marque.' The question at the trial arose entirely on the effect of the words by which the assured was authorized to carry letters of marque.— On the part of the *plaintiff*, it was contended, that the words which authorized the carrying letters of *marque* authorized her to chase any enemy's vessel that she should fall in with in the course of her voyage, for any indefinite period, and in what course the assured thought proper, but not to cruise; and that no deviation in the course of such chasing, discharged the underwriters. On the other hand, it was contended, that the terms of the policy having designated a commercial adventure, within certain prescribed limits, the liberty of carrying letters of *marque* must be subservient to such adventure, contemplating only such hostile risks as ultimately might result from acts of aggression on the part of the enemy, and measures of safety on the part of the assured; and that under such liberty of carrying letters of *marque*, no deviation for the purpose of pursuing vessels, which at the time of pursuit were not known to belong to an enemy, was warranted. To this opinion I inclined, and I directed the jury to find for the *defendant*. The case of *Jolley v. Walker*, *Park's Law of Insurance*, 299, was cited in behalf of the *plaintiff*. It was supposed that that case resembled the present, but on inspecting the policy no such form of words appeared. It was a policy at and from *London* to *Cork* and the *West Indies* warranted to proceed on the voyage, with 60 men, with 22 guns, & carronades and sheathed with copper, which indicated an intention to employ her for hostile purposes, and shews that

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defendant well knowing, &c. on the days aforesaid, and on divers other days and times, between that day and the day of exhibiting of the bill of the *plaintiff*, widened, deepened, and enlarged certain *fenders*, sluices, drains, and water-courses, leading from and out of a part of the said river higher in the stream thereof than the commencement of the said stream of water so flowing from the said river to the lands of the said *plaintiff*, and thereby drew off and diverted from the said river a certain quantity of water that used to run and flow through the said sluice of the said *plaintiff* in and through the said land, &c. PLEA, not guilty.

This cause was tried at Lancaster, at the last assizes, before GRAHAM, B. when a verdict was given for the *plaintiff* under the direction of the learned judge. It appeared in evidence, that the *defendant* and the persons under whom he claimed, had been in possession of lands contiguous to and of the use of the water of the *Irwell*, in the year 1721. That about eighteen years ago the *defendant*, or the persons under whom he claimed, first erected his mills, and took the water lower down the stream. Some years ago, about 1799, there being a scarcity of water, and a dispute about it between the parties, they agreed that when the *defendant's* mills were not at work, a certain *fender* or *clough* which backed the water for his use, should be so regulated as to let the water run to the *plaintiff's* mills instead of being wasted. Of this *clough*, the *defendant* kept the *key* and the *plaintiff* paid 2s. a week to one of the *defendant's* men, for the purpose of regulating the water for his convenience. Since his first coming, the *plaintiff* had increased his works from three wheels to twenty-eight. In 1803, the *defendant* also enlarged his sluices greatly, and there was a considerable deficiency of water from that time. And it was for this injury that the present action was brought.

In last *Michaelmas* term, PARK, for the *defendants*, moved for a new trial, and stated that the learned judge, in summing up to the jury, told them expressly that there was no question of fact for them to consider; for the only question was, whether the *defendant* could so enlarge his sluices, as to take more water from the *Isle* than he had formerly done, and if he took one pint of water more, to the injury of the *plaintiff*, the present action was maintainable. The jury hesitated as to the facts, and came back into court; but the *learned judge* told them, that he could give them no further directions; that there was no question of fact. PARK now insisted, therefore, that on the evidence of one *Hardman*, a question arose, whether the *plaintiff* and *defendant* had not agreed to settle their rights, and that the *plaintiff* should only have the water which would otherwise be wasted from the *defendant's clough*; or whether the evidence of his keeping the key of this clough was not evidence of a title to the water under a possession for 80 years, there being no evidence to presume a title or grant on the part of the *plaintiff*, he not having had possession for 80 years. Whereupon a rule to shew cause, why a new trial should not be had was granted to him; and upon a former day, in this term, the learned judge reported the facts; but having omitted to state that he narrowed the case into a mere question of law, and it appearing from the notes of two of the counsel in the cause, that it was so left to the jury, the case stood over till this day, when the learned judge reported, that as it appeared upon the notes of two gentlemen, that he had stated there was no question of fact, he presumed that he must have used such an expression; but he did not state any dry proposition of law as applied to this case; but, merely that on the supposition of the fact, of very considerable enlargement being proved in 1791, ac-

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According to the evidence of *Hardman*, then it resolved itself into a question of law merely; but he could not be understood in the letter of the expression, when he said that not a pint of water more should be taken by the *defendant* now than formerly.

COCKELL, *Serjeant*, and TOPPING, now shewed cause and concluded from the evidence, that although in 1724, certain works were constructed on that property which the *defendant* now has, yet the water from the *Irwell* was very inconsiderable, and the works very slight. In 1787, the *plaintiff* erected his wear, and cut his sluice. In 1791, the *defendant's* wear having been blown up, he erected another wear, and cut another sluice. And that he has now enlarged the sluice, so that there is at least four times the water taken now than was formerly. That with respect to the evidence of the *defendant's* keeping the key of the clough, it amounted only to a proof that he had, as it were, the muniments or title-deeds of the possession, having himself the larger portion, and the more ancient title to the stream, but that it did not abridge the *plaintiff's* right to the use of the water, and that he must be understood as having the same right to the water now as upon his first settling upon the stream. That unless, up to 1803, the *defendant* had been used to take the whole of the water, he could not now so enlarge his sluices as to deprive the *plaintiff* of the use of what he had formerly.

ERSKINE, PARK, HOLROYD, and SCARLETT, *contra*, contended that the *defendant* having had the full possession of the stream up to 1788, was entitled to have the whole use of the water. That the proof of possession from that time would not give a title to the *plaintiff*; that the evidence of *Hardman* went to shew not only the nature of the former possession by the *defendant*, but that the *plaintiff* by paying him 2s. a week

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as a *douceur*, and allowing the *defendant* to keep the key of the clough, which was only put down in order to save the water for the *plaintiff* after the *defendant* had used as much of it as was convenient, had acknowledged the right of the *defendant* to the whole stream; and that he, the *plaintiff*, should be entitled only to the waste water; that, if the *plaintiff* was allowed to enlarge his works from three wheels to twenty-eight, the *defendant* must be at liberty also to enlarge his works. That in *Cox v. Matthews*,* it was laid down by Lord Hale, that "if a man has a water-course running through his grounds, and erects a mill on it, he may bring his action for diverting the stream; but on the evidence, it will appear, whether the *defendant* had a stream running through his grounds before the *plaintiff* had it and turned it as he saw cause." That the evidence, in this case, therefore, amounted to the same thing, and went to prove that the *defendant* had the use of the stream, and turned it as he saw cause before the *plaintiff* had the use of it; and that for forty years from 1724 the *defendant* had taken the whole of the water.

LAWRENCE, J. "But that comes to the question, whether, if he has a right to take the whole of the water or rather as much as he pleases, by means of a gutter of one foot wide or deep, he can take it by means of a gutter of four feet wide and deep."

Lord ELLENBOROUGH, C. J. "It does not appear to me that this verdict ought to be disturbed. It is now attempted to be set aside, and a new trial is sought, on the part of the *defendant*, on the ground that all the evidence was not left to the jury, for them to decide upon, in order to come to a right conclusion upon the law on the subject, which was necessary to enable them

* 1 Vent. 237. Saunders.

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to form such a conclusion fairly; and the evidence of *Hardman* is pointed out as material for that purpose. If, however, as it appears upon the face of the learned judge's report, the whole of the evidence was left to them, and they were directed to decide upon the facts combined with the law, as stated to them by my Brother GRAHAM, and the verdict was given upon the whole of the evidence so left to them, there is surely no reason why it should now be disturbed. But if the evidence of *Hardman*, which is now in question, had been so left to the jury, and the jury had found a verdict for the *defendant*, I am of opinion, that such a verdict ought to have been set aside; and having that opinion, we ought not now to send the cause down for a new trial merely for the purpose of obtaining such a verdict. To see, whether the direction of my Brother GRAHAM, and the verdict, which followed upon it, were right, let us examine what appears now to be the effect of the whole evidence, as it stands upon his report. The first date, to which the *defendant* refers the use of the water in those from whom he claims is 1724, which indeed is fully sufficient to establish a right to the use of it. But on a subject, such as this of a water-course belonging to lands, independently of any previous occupancy, every man has a right to have the use of all the water undiminished which passes through his lands. Yet, however, a right contrary to that may very well arise by grant or otherwise, and, in the natural course of things, it may arise by occupancy. The question, therefore, is here, what right the *defendant* has acquired by the occupation which he has had of this water. Upon that subject, we must presume, that if the right which he has enjoyed intrenches upon that of others, as if, either all the water which would come down the river to the lands below, in the natural course, is prevented from coming down in its full stream, by means of his use of it in the upper lands; if it comes

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down, interrupted in point of time ; or if it comes down corrupted in quality, I mean by such use particularly, as it is applied to by dyers and other manufacturers, and which if it continued for a day or a year, would be an injury for which an action would lie ; yet, if the party has enjoyed it in such a manner, and that enjoyment has subsisted for any time, we may presume a grant ; and other persons who come below in the stream must take it subject to that right of enjoyment. And if the water has been taken by any one, for 20 years, back, that would afford a sufficient presumption of a grant, or of some other conveyance of a right. But, even then, 20 years' occupation may afford a presumption more or less strong or even none at all, according to the circumstances in each particular case ; and the question will presently be, what presumption, as applied to the *defendants*, and supposing the evidence of *Hardman* to have been left to the jury, the occupation which he has had of the water will give him. From the year 1724 to the year 1787, his enjoyment of the water has subsisted. But the *defendant* has not had, during that time, the enjoyment of the whole stream, but only a partial enjoyment of it. There existed a *wear* besides ; and a *channel* of given dimensions conveyed to the *defendant* the water which he was accustomed to use. In this state, with the surplus of water running off, for the benefit of the works and mills below, the *plaintiff* comes to his land, and for four years, he enjoys the use of this water without interruption. Then with no notice of any further claim to the use of more water by the *defendant*, he goes on erecting his mills at a considerable expense, and finding the water sufficient for the working of them, he enlarges them. He does this for four years, and I wish to know supposing the quantity which then comes down is the same as before, whether he is not to be supposed to have a full right to all that which he then enjoyed. This is the situation

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of things from 1789 to 1791, when the *defendant* began to erect other works, and to enlarge his wear or sluice and gutter. About that time, to avoid disputes, the parties agreed to put up a fender, and the care of it was given to *Hardman*, who was the servant of both, as I understand the evidence, and was employed to take care of the clough in order to secure to the *plaintiff* the enjoyment of the use of the water as before. It is said that the *defendant* was desirous of keeping *Bealey* quiet; now if *Bealey* had no right to the water, what necessity was there to keep him quiet. I take it, that from the moment of the enlargement of *Bealey's* works his possession must be taken as a possession of occupancy or on a composition of their differences, and not an adverse possession by *Bealey* against the rights of *Shaw*. It would be indeed impossible to have left it to the jury to presume a grant to *Bealey* either for the previous time or the time subsequent to this enlargement. And it would be too much to infer that from *Bealey's* not going to law when the key of the clough was so kept by *Shaw*, and the man employed to let it down at certain hours, he therefore acquiesced in the *defendant's* right to the whole water, because he did not go to law then. People are unwilling to go to law where they have their rights in any manner acknowledged to them; on the contrary, they lie by until the adverse party comes to deprive them of all their rights. Here *Shaw* attempts to deprive *Bealey* of his whole right after having allowed him to enjoy it under a mutual acquiescence for four years, and that after permitting him to go to great expense in erecting his mills and buildings. I see nothing upon the evidence of *Hardman*, if it had been left to the jury, which would have altered the question of law; and if it had been so left, and the verdict had been for the *defendant*, I think it ought to have been set aside, and, therefore, that we ought not to disturb the present verdict, in order to obtain one which cannot be sustained.

GRUSE, J. "The question is, whether this verdict is either against law or fact? Whoever takes a piece of land contiguous to a river, takes it with all its easements; all its water, subject to the rights of others. Now let us see whether the *plaintiff* by this verdict has more given to him than he has a right to, and than the *defendant* has hitherto actually given him. The right exercised by the *defendant* was this; he had water coming from a small water-course in the ordinary way, which he afterwards increased so as to look like a canal. He not only widens it, but he makes it deeper; so that at times, the *plaintiff* gets no water at all. The *defendant's* right, however, was only to such water as was enjoyed by him at the former time, and, by increasing his channel, he takes all the water from the *plaintiff*; he has, therefore, deprived the *plaintiff* of that benefit which he had upon coming to his estate. The *plaintiff* is then most materially injured, because he does not now enjoy that which he had enjoyed before, and the *defendant* has obtained more. It is said, indeed, that there should be a new trial, because the evidence of *Hardman* was not left to the jury. But giving to it all the effect which can be contended for by the *defendant*, it only proves that at a certain time the *plaintiff* applied to the *defendant*, complaining that he had not sufficient water; that the *defendant* kept the key of the clough through or over which the water was to come, and that the *plaintiff* permitted him to keep it a certain time. But compared with the rest of the evidence, what does it amount to? Why, that the *defendant* having the use of the water before that time, conceded to the *plaintiff* the use of the stream which he formerly had in it."

LAWRENCE, J. "I take the law to have been very correctly stated at the trial. Inasmuch as in 1724, the *defendant's* predecessors had built those mills which

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he occupies, he had from time to time taken the whole of the water. Yet his use of it was such as still left sufficient for the *plaintiff* not only when he first built his mills, but afterwards, when he enlarged them, and subject to this occupation, the right of the *defendant* must now be narrowed. But I do not mean to say now that if there had been other water left for the *plaintiff*, enough for the use of his *works*, the *defendant* might not have appropriated more water to himself than formerly. And as it all depends upon the priority of occupancy, it must appear that the *defendant* enjoys now only what he had before, or does not gain more than will still leave to the *plaintiff* what he had also before. Then the question is, whether there is any evidence to shew that this *plaintiff* had, when he enlarged his mills, appropriated to himself any more water than he had before that time. It is said that the evidence of *Hardman* proves this; but, in my opinion, it will not do so. It does not prove that there was any change in the rights of either; and where the right of the *plaintiff* was ascertained before, the acquiescence of the *defendant*, in his use of the water for four years, does not either go to ascertain that which was already settled before, nor to abridge it; and it by no means shews, that the *defendant* was entitled to the whole use of the water. Then assuming the fact, as proved, and all the evidence goes to prove it, that the *defendant* had taken so much water as considerably to abridge the *plaintiff's* rights, my brother *Graham* might well say that it resolved itself into a question of law. Or it is possible he might have left it to the jury to consider whether *Hardman's* evidence was contradictory; but I think if he had left it to the jury, he ought to have said that it does not weigh either the one way or the other."

LE BLANC, J. "It is impossible to say very well what

was left to the jury without knowing the points which were insisted upon at the trial ; but it seems, from the report, that the case put for the *plaintiff* was, that prior to 1803, he had the whole of the water ; that the *plaintiff* having placed himself on the stream in 1788, had only a right to take what the *defendant* chose to give him. My brother GRAHAM denied that right ; and very properly. The right to water in this way depends upon occupancy, and the true expression of the right of the *defendant's* predecessor was this, that though he might at first settling on the stream have taken as much water as he pleased, yet when he has erected his works, he is entitled only to such water as passes from a certain channel which marks his *occupancy* ; and though he might at one time have taken all the water, yet having erected his works if another person comes and erects other works, he cannot say, because he might once have taken all, he shall take *all* now. That is the law, as it may be said to have stood at the time when the two parties came upon the stream. Subsequent to 1788, the *plaintiff* has indeed enlarged his works, and still had enough of water. What then is the effect of the evidence of *Hardman* ? Give the fullest effect to it, and suppose that from that time to 1791, the party had been contented to take only such water as the *defendant* chose to give him ; yet the right being before well settled between the parties, it was not necessary in summing up the evidence to rely on that as a relinquishment of this right of the *plaintiff*. When a case comes to be argued for a new trial, it is very easy to say such and such evidence ought to have been left to the jury ; but unless the points to which that evidence goes were then made, it is not sufficient ground to put us upon sending it to a new trial, especially when we see that if the whole of that evidence were left to the jury in its full extent, it ought not to induce them to alter the verdict.

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SCURFIELD against GOWLAND.—9th February.

Where a judgment entered up to secure an annuity was set aside, the party brought assumpsit for money had and received, and produced the annuity-deed as evidence of the consideration; held, that, although this deed, upon the face of it, does not appear to be void, yet upon proving the rule to set aside the judgment, and to deliver up the warrant of attorney to be cancelled, the plaintiff might recover, because one of the securities failing upon which the annuity was granted, the whole fails, and the consideration money becomes money had and received to the use of the plaintiff.

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GOWLAND.

THIS was a rule to shew cause why there should not be a new trial. The action was for money had and received, tried before Lord ELLENBOROUGH, C. J. at Westminster, the sittings after last Michaelmas term. The plaintiff was the grantee of an annuity, granted by the defendant for the price of 600*l.* and upon application to this court, the same was ordered to be set aside and the warrant of attorney in the court of Common Pleas to be delivered up to be cancelled. There being a defect in the memorial, and the warrant of attorney being in terms to enter up judgment in the court of Common Pleas, but the judgment thereupon being entered up in this court. The present action was, therefore brought to recover the consideration money given for the annuity, together with interest. At the trial, the plaintiff produced the bond and annuity deed, in order to prove the transaction upon which the money was lent. The counsel for the defendant objected to this, and said, that, as this deed was not cancelled, there appeared an existing security for the payment of the annuity, and then the plaintiff could not recover as for money had and received. And they stated, that in the case of *Shove v. Webb*,* where it was held that the plaintiff might recover, as for money had and re-

* 1 Term Rep. 732.

ceived, all the deeds had been delivered up to be cancelled. Whereupon his lordship directed the *plaintiff* to be non-suited.

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PARK and DAMPIER now shewed cause for the *defendant*, and insisted on the grounds taken at the trial, and said that *Lord Kenyon* would never decide upon the point whether by setting aside the security in this court every other security could be made void under the fourth section of the annuity act, 17 Geo. III. c. 26; but this proceeding was upon the third section of that act, and they argued that even if it were made void by the statute, so that the party could not recover upon it, yet that ought always to be shewn in pleading; or otherwise they might wait till there was no evidence to be obtained to make this deed apply to the rule, and then act upon the deed again.

Lord ELLENBOROUGH, C. J. "Is it not a valid security until it is cancelled, and may not the *plaintiff* proceed, either in the court of *Exchequer* or the *Common Pleas*, upon this very deed, provided they should hold a different opinion as to the memorial?"

GARROW and MARRYAT, *contra*. "This annuity bond is not an available security; for the statute 17 Geo. III. c. 26, makes not only the warrant of attorney void, but all other securities. The courts will not differ in their opinion upon the act, and therefore, in order to prove this deed invalid by pleading, we must be put to bring an action upon it, in which we must fail in order to lay a foundation for this other equitable action."

Lord ELLENBOROUGH, C. J. "But still as long as this deed and bond exist uncanceled, they appear to us valid instruments, and stand in your way. It is true that the act avoids all other deeds and instruments besides the warrant of attorney, but that only means

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that they shall be deemed void when the ground of their invalidity is made to appear to us properly, by pleading to the bond; and you cannot shew that it is void upon the general issue, *non est factum*. You might have given up the bond before you brought the action."

MARRYAT. "If one of the securities is invalid, the whole are so; *Cumming v. Isaac*,* *Chawner v. Whaley*,† and the question is, whether those two deeds, the bond and annuity deed being void as will appear by the production of the rule of this court, at the trial, will be any impediment to our bringing this action."

Lord ELLENBOROUGH, C. J. "Could you plead this rule of court to an action on the bond? You might indeed plead all the facts on which the judgment of this court was founded, when the warrant of attorney was set aside, but you could not plead the rule of court merely: and the court indeed sets aside the warrant of attorney under its ordinary power, and not under the annuity act."

MARRYAT. "Then the money for the purchase of the annuity is paid in consideration of an annuity to be secured by certain deeds: and if one of them fails, the contract being entire, the whole contract fails."

Lord ELLENBOROUGH, C. J. "I think the way in which Mr. MARRYAT has now put it is very forcible. The *plaintiff* has a right to have an entire thing, namely an annuity secured by three several valid securities. Then, having taken away one of the securities, the whole consideration fails, and in that way of considering it, I think, we may sustain this action, but, on the other point, I am of the same opinion as before. I am glad that we can come to the justice of the case by this means; but however anxious I am to do substantial justice, yet I rejoice that I am not compelled to over-

learn the forms of law, which, I think are, in general the best means of securing to all parties their rights, and attaining the true ends of justice."

RULE ABSOLUTE, to set aside the nonsuit, &c.

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Ex parte BROCK.

An apprentice in the Greenland Fishery trade is not protected from being impressed beyond three years, though if he be bound for a longer time, the master is bound to keep him in his service under a penalty of 50l. by stat. 9 Geo. III. c. 5, s. 5.

JERVIS obtained a rule to shew cause why a writ of *Hab. Cor.* to bring up an impressed seaman should not be set aside *quia improvide emanavit*.

**Ex parte
BROCK.**

The affidavit on which the *Habeas corpus* was obtained, stated that Brock, the impressed man was indentured on the 10th of March, 1801, for the term of five years, to serve on board certain ships belonging to one Morson, in the Greenland Fishery trade. That without this man Morson had not got his complement of men to entitle him to proceed to sea, under the acts for the encouragement of the Greenland Fishery. That he was impressed on the 31st of October, being only of the age of eighteen years and three months; so that it appeared Brock had been at sea three years, and was upwards of eighteen years of age.

By the 15 Geo. II. c. 28, s. 5, no harpooneer, line manager, boat steerer, or seaman, who shall be in or belonging to any ship or vessel in the Greenland Fishery trade, shall be impressed from the said service: By stat. 26 Geo. III. c. 41, s. 17, "in order to prevent disputes that may arise whether a ship be properly qualified and duly fitted out for the whale fishery, according to the provisions of that act, "&c." every

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Brock.*

such ship shall have on board apprentices indentured for the space of three years, at the least, who shall not exceed the age of eighteen years, nor be under fourteen years of age at the time they shall be indentured, in the proportion of one apprentice at the least for every 35 tons burthen, which apprentices and fresh or green men, shall be accounted in the number of men required to be on board such ship as aforesaid." The stat. 29 Geo. III. c. 53, s. 5, recites 26 Geo. III. c. 41, as above and also 26 Geo. III. c. 50, that no person shall be entitled to a premium unless his vessel shall have on board an apprentice, indentured for three years at the least, for every 50 tons burthen, every such apprentice not exceeding the age of eighteen years, nor being under fourteen years, and also 28 Geo. III. c. 20; and enacts that "if the master to whom any such apprentice shall be bound, shall permit him to quit his service, on any pretence whatever except as therein provided, before the expiration of the term for which he shall be bound, he shall forfeit 50l." And by the 32 Geo. III. c. 22, s. 3, "every ship having on board one apprentice, at the least, for every 70 tons burthen, every such apprentice not exceeding the age of twenty years nor being under twelve years, at the time he shall be indentured, shall be deemed qualified with respect to the number and age of apprentices to proceed on the fishery to the *Greenland* and *Davis Straights*," &c. The statute 13 Geo. II. c. 17, the ordinary act for exemption of mariners' apprentices, did not apply to the case; but from these statutes it was contended by

ERSKINE and HOLROYD, that there resulted an implied exemption in favour of *Brock* against being impressed, because the apprentices were to be bound for three years at the least, and could not quit the service under a penalty on the master.

GARROW and JERVIS *contra*; And by

LORD ELLENBOROUGH, C. J. "If you bind them

for more than three years, it is at your risk. They are protected for the three years by the legislature; but it is required also, by these acts, that if you do bind them for more than three years, you shall keep them, so that the binding may not be merely colourable. All these particular expressions seem to me the other way; they shew that the legislature is anxious to protect the persons enumerated in the acts, but that it leaves these parties to the general law."

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RULE ABSOLUTE.

This motion was made, in the present form, in order to try the question with the least expense to the party.

BENTINCK against DORRIENS and another.—Feb. 7.

Where on a bill being presented for acceptance, the drawee wrote an acceptance, but before it was called for, obliterated it; and the holder caused it to be noted for non-acceptance: Held, that he could not maintain an action upon it as for an acceptance, whatever might be the case as between the drawee and other parties, who were not bound by the act of noting.

THIS was a rule to shew cause why an award made between the above parties should not be set aside. The question turned entirely upon the point, whether the plaintiff could recover against the defendants as acceptors of a bill of exchange, of which the plaintiff was the present holder as indorsee: and the arbitrator, Mr. Serjeant BAYLEY, in order that the parties might take the opinion of the court upon the law of the case, stated the following facts in his award; namely, that "on the 31st day of May last, the defendants signed an acceptance thereon; but that on the 1st day of June, and before the said bill was called for, they cancelled that acceptance, and the said J. G. Bentinck caused the same to be noted for non-acceptance." And there-

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fore, upon the authority of *Sproat v. Matthews*,* the learned Serjeant awarded that the plaintiff could not recover against the defendants as upon an acceptance.

PARK now shewed cause, and referred to *Trimmer v. Oddy*, E. T. 1800, and *Thornton v. Dick*, sittings after Hilary term, 1803, N. P. at Guildhall, in which it had been held that an acceptance once made, though afterwards cancelled, was binding; but admitting the authority of these cases, he contended that there were circumstances from which to infer, in those cases that a fraud was meditated; and he relied upon *Sproat v. Matthews*, referred to by Mr. Serjeant BAYLEY, to shew that where a party had noted a bill for non-acceptance, he could not consider it afterwards as an accepted bill.

LAWES, *contra*, relied principally on the cases cited to shew that an acceptance once made upon a bill could never be altered. And said that the noting it could not alter the case, because if an acceptance was once made upon the bill, the drawer and other parties, antecedent to the present holder, being interested in it, any thing which he could do would not render it the less an acceptance.

THE COURT made several observations *obiter* upon the rule, which formerly obtained in the time of Lord Hardwicke, that any thing written upon a bill was an acceptance;

LAWRENCE, J. observed that, though an acceptance once made could not be altered, yet it might, indeed, be properly questioned, whether it ought to be considered as an acceptance, until it was communicated to the parties on the bill; and yet, on the other hand,

* 1 Term Rep. 182.

would be productive of great difficulties if it were left to be explained whether or not the name was put upon the bill by mistake or accident.

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And upon the principal question, by

Lord ELLENBOROUGH, C. J. " If it was an acceptance, the drawer, and other parties antecedent to the holder, may still come upon the acceptor notwithstanding; for this protest cannot bind them. Or, if not an acceptance they may bring an action against the notary for neglect of duty. This does not amount to a discharge of the acceptor, by the holder, with respect to the other parties; it amounts to saying that he was never chargeable with respect to the holder. I own I was struck a little at first with considering the rights of third parties as being concerned; but if it was an acceptance it could never be a discharge as against them.

RULE DISCHARGED.

Ex parte COPPINGER.—February 7.

REGULA GENERALIS—Hilary Term, 45 Geo. III.

DAY RULES.

MARRYAT moved for four *extra* day-rules for a prisoner, and stated that he understood that the rule pronounced by the court on the first day of the term was not intended to be adhered to.

Ex parte
COPPINGER.

Lord ELLENBOROUGH, C. J. " On the first day of the term we made a rule on this subject in expectation that it would meet with the concurrence of the other courts; in that we were mistaken. The former rules stated that the prisoner should have three days generally, and as many *ex gratia* as the court shall direct upon special application. This was altered by our rule of this term, but as there has not taken place that

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concurrence which we expected, we shall vacate the latter part of our rule, restraining *them* to seven days, and then it will be that they shall have as many days as the court, upon application, shall think fit to grant, so as to leave the rules of the court as before the recited rules, and the prisoners perfectly at liberty to move for as many as they please."

LAWRENCE, J. "What was the practice before the three last rules on the subject, will be the practice now."

PER CURIAM, As the rules are still in the breast of the court, we shall promulgate the whole of the rule of the present term excepting the two last lines which confine it to seven days.

The rule made the first day of this term was as follows :

WHEREAS by a rule made in *Easter* term, in the 30th year of the reign of his present majesty, it was ordered that no prisoner in the *King's Bench* prison or within the rules thereof should have or be entitled to have day-rules above three days in each term ; and by another rule made in the term of St. *Michael*, in the 37th year of the reign of his present majesty, it was further ordered that notwithstanding the said hereby in part recited rule, if any prisoner in the *King's Bench* prison should hereafter state by *affidavit* any *special* cause to the satisfaction of this court for having any additional day-rule or day-rules beyond those allowed by the aforesaid rule, such additional day-rule or rules should be granted accordingly for any day or days ensuing such application ; IT IS HEREBY ORDERED that *so much* of the said first mentioned rule as is *above* recited, and the *whole* of the said last mentioned rule be *repealed* and *discharged* ; [And IT IS FURTHER ORDERED, that hereafter no prisoner in the *King's Bench* prison, or within the rules thereof, shall have or

be entitled to have day-rules above seven in each term.]* 1805.

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COFFINGER.

ELLENBOROUGH, C. J.

N. GROSE, J.

S. LAWRENCE, J.

S. Le BLANC, J.

HARVEY against COOKE, and another.—February 8.

Where a captain under the command of a flag-officer had quitted his station in disobedience of orders, but with a view to the service of his country, and for which therefore he received the approbation of the admiralty, and thereupon took a prize; held, that the flag-officer was not entitled to the flag-eighth share, under the proclamation of 1795, as he was neither actually on board, nor even impliedly directing or assisting in the capture.

THIS was an action of assumpsit for money had and received, &c. tried at Westminster, in the sittings after Trinity term, 1804, before Lord ELLENBOROUGH, C. J. against the defendants as agent of Captain Milne to recover 4261l. 4s. 8d. on the following circumstances. Captain Milne of his M. S. the *La Pique*, was in March, 1796, on the *Leeward* station in the *West Indies* under Sir John Laforey, a commander in chief on that station. On the 24th of April, 1796, Admiral Laforey was superseded by Rear-admiral Sir H. C. Christian, and Captain Milne put himself under his command. On the 29d of June, 1796, Admiral Christian was superseded by the plaintiff, Rear-admiral Sir H. Harvey, who had arrived as commander in chief on that station. On the 14th of September, 1796, Vice-admiral Sir H. Parker, not having been specially appointed to that command, arrived at *Barbadoes* on the

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* This part of the rule appears therefore to be now vacated.

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Leeward Island station ; on which he remained waiting for orders from the *admiralty*, and being senior in rank to the *plaintiff* till the 1st of *November*, 1796, when he went to and took upon him the command of the *Jamaica* station, leaving the *plaintiff* commander in chief on the *Leeward* Island station. On the 21st of *July*, 1766, Captain *Milne* sailed from *Demarara* to *St. Kitts*, with a convoy of merchantmen under his care, under the particular circumstances after stated, without orders from the *plaintiff*, or any other Admiral ; and on the 10th of *August* following, proceeded without orders from *St. Kitts* to *England* with the same convoy, and arrived at *Spithead* on the 9th of *October*, and on the next day communicated such arrival with an account of his proceedings to the *admiralty*. On the 1st of *June*, 1796, Admiral *Christian* wrote to the governor of *Demarara*, informing him that he should direct a ship of war to take under convoy on the 15th of *July*, the trade from *Demarara*.* Between the 16th and 18th of *July*, the said governor received a memorial from the *planters*, *merchants*, and others, at *Demarara*, having ships ready to sail with the convoy, which in consequence of the convoy not arriving, contained a most pressing request that he would prevail upon Captain *Milne*, of the *La Pique*, to convoy them to *St. Christopher's*, urging the danger of delay and their great disappointment in not having the convoy. Whereupon the governor wrote to Captain *Milne*, 18th of *July*, 1796, stating the said letter and memorial to him, and requesting him to convoy the ships "as far as he should judge necessary to enable them to reach the general rendezvous," adding "that his speedy and immediate return was of no less consequence to the pro-

* This letter was set out at full in the case. It is stated briefly here, as well as other passages of the case, which are marked between asterisks.

tection and defence of the colony." In consequence whereof, he sailed the 21st of *July*, 1796, with the trade there, and arrived at *St. Christopher's*, the 31st of *July*, 1796. On the 27th of *July*, 1796, Captain *Milne* being off *St. Lucia*, wrote to Admiral *Christian* at *Martinique*, which letter arrived there on the 1st of *August*, 1796, and contained *inter alia* the following words: "I was favoured with yours of 23d *June*, and 21st *July* after I was under way with the trade from *Demarara*, but found no orders transmitted as mentioned." My orders from Captain *Davers*, a copy of which I inclose, were to lie off *Demarara* for the protection of that colony. He then states the reasons for his quitting that colony, and adds that should the convoy be gone from *St. Christophers*, he shall wait two days for orders. On the first of *August*, 1796, another memorial was presented by the captains of the vessels under his convoy, urging him to proceed with them. In consequence of which on the 19th of *August*, 1796, he proceeded with them to *England* without orders; previous to which he wrote to the plaintiff a letter dated the 9th *August*, 1796, stating his reasons for his conduct, noticing that *as yet* he had received no orders, and amongst other expressions importing the want of orders, said, "I hope you will view my conduct in the light I mean it. It is only the risk of so great a *British property* that could induce me to proceed without orders." He also left a letter for any officer with dispatches for the *La Pique*, containing an account of his course. On the 13th *September*, 1796, the plaintiff wrote to the admiralty an account of the conduct of Captain *Milne*, stating that he the plaintiff had dispatched the *Ariadne* to convoy the *Demarara* trade, but she did not arrive at *St. Kitts* until ten days after the *La Pique* had sailed; adding "on the conduct of Capt. *Milne*, I beg leave to observe, that I consider his anxiety respecting the safety and security of the ships under his con-

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voy were his motives for proceeding to *England* without any orders, but I regret that he did not wait at *St. Kitts* a few days longer, when the *Ariadne* would have arrived. "Captain *Milne*, on the 8th *October*, 1796, in his *M. S. La Pique*, out of the local limits of the *West India* station, viz. between the *Start Point* and the *Bill of Portland*, in the *English channel*, captured the prizes in question, which were condemned; the proceeds whereof came to the defendants' hands before the day in the declaration and the flag-officers' eighth amounted to 426l. 4s. 8d. Captain *Milne* arrived at *Spithead* 9th *October*; and the 10th addressed a letter to the lords of the admiralty, stating his conduct, and assuring them that nothing but the risk of so great a property being either lost or captured would have induced him to sail until orders from his commanding officer. To which on the 11th, Sir *E. Nepean* on the part of their lordships returned him for answer that they approved of his proceeding to *England* with the convoy.

The following are extracts of his majesty's proclamation, respecting the distribution of prizes, dated the 15th of *September*, 1795.

The captain or captains of any of our said ships or vessels of war who shall be actually on board at the taking of any prize shall have three-eighth parts, but in case any such prize should be taken by any of our ships or vessels of war under the command of a flag or flags, the flag officer or officers being actually on board or directing and assisting in the capture, shall have one of the said three-eighth parts, the said one-eighth part to be paid to such flag or flag-officers in such proportions and subject to such regulations as are hereinafter mentioned.

We do hereby further will and direct that the following regulations shall be observed concerning the one-eighth part here before mentioned, to be granted

to the flag-officer or officers, *who shall actually be on board at the taking of any prize or shall be directing or assisting therein* : first, that a flag-officer, commander in chief, when there is but one flag-officer upon service, shall have to his own use, the said one-eighth part of the prizes taken by ships and vessels under his command ; secondly, that a flag-officer sent to command at *Jamaica*, or elsewhere shall have no right to any share of the prizes taken by ships or vessels employed there before he arrives at the place to which he is sent, and takes upon him the command ; thirdly, that when an inferior flag-officer is sent out to reinforce a superior flag-officer at *Jamaica* or elsewhere, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer before the inferior flag-officer shall arrive within the limits of the command of the superior flag-officer, and actually receive some order from him, fourthly, that a chief flag-officer, returning home from *Jamaica*, or elsewhere, shall have no share of the prizes taken by the ships and vessels left behind to act under another command ; fifthly, that if a flag-officer is sent to command in the out-ports of this kingdom, he shall have no share of the prizes taken by ships or vessels which have sailed from that port by order from the admiralty ; sixthly, that when more flag-officers than one serve together, the eighth part of the prizes taken by any ships or vessels, of the fleet or squadron ; shall be divided in the following proportions, viz. if there be but two flag-officers, the chief shall have two third parts of the said one-eighth part, and the other shall have the remaining third part : but if the number of flag-officers be more than two, the chief shall have only one half and the other half shall be equally divided amongst the other flag-officers. The question for the opinion of the court is, whether the plaintiff is entitled to recover

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in this action the eighth or flag-share of the amount of the proceeds of the prizes above stated, or any and what part thereof?

DAUNCEY, *for the plaintiff*, "Captain Milne was at first under the command of *Admiral Christian*; but at the time when he sailed from *Demarara*, he was under the command of the *plaintiff*; and what he did at the request of the governor and merchants there, for the benefit of the service, he must be considered as doing under the implied command of *Admiral Harvey*. When he sails from *St. Kitts*, at least, he knows himself to be under his command, for he writes to him of his intention of proceeding, and says, he shall sail slow in order to wait for orders. Up to that moment, he was under the command of *Admiral Harvey*, and had anticipated the approbation which was afterwards given to his conduct. The difficulty which arose in the case of *Lord Keith v. Pringle*,* does not arise here; for the *quantum* now comes in question, and it is difficult to say that when an officer is clearly under the command of a certain flag-officer, and has received no order from any other, such flag-officer is not entitled to his share.

[LE BLANC, J. "It is admitted that if the prize had been taken by the *Ariadne*, there it would clearly belong to *Admiral Harvey*."]

"Captain *Milne* as well as Captain *Vaughan*, in the *Ariadne*, commenced his voyage under the command of *Admiral Harvey*; and they must be in the same situation, as they, neither of them, came under the command of another admiral."

[Lord ELLENBOROUGH, C. J. "Have you any case to shew that when a captain comes into the limits

* 4 East. 262.

of any other flag-officer, the first flag-officer is entitled to the flag-share for the prize taken within the limits of the second admiral's station."]

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"There is no case which decides that. It was said indeed that evidence has been given of the practice under the proclamations, that the admiral cannot take to himself the right to any prize until he comes within the limits of his station. But this distinction, as to limits, does not apply here. Captain *Milne* must either say he acted in obedience to no orders, or that he was under the command of Admiral *Harvey*, and yet will not pay him his share. And if he acted in disobedience of orders, that will not deprive the Admiral of his share. It is a sort of fraud, as in 1 *Robinson's Admiralty Cases*, p. 22, where the captain of the *Cesar* being in sight of two *Liverpool* privateers, and having a *Dutchman* in company, persuaded him that they were two Frenchmen, and to run away from them; and having got out of their sight took him, he knowing nothing of the war with *England*; this was held a fraud on the two privateers, and they were entitled to a share. So in 3 *Robinson*, p. 1, and 3 *Rob.* p. 194 and 311."

LORD ELLENBOROUGH, C. J. "You have said that you do not consider him as acting with any fraudulent intentions, for you say in Admiral *Harvey's* own letter, 'I conceive that his anxiety for the safety of the ships under his convoy was his motive for proceeding without my orders;' so that you neither say that he did wrong by acting fraudulently, nor that he acted under orders."

DAUNCEY was then proceeding to read the antecedent proclamation, and the subsequent, to shew the construction of this proclamation, when

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LORD ELLENBOROUGH, C. J. said, "We cannot look to the subsequent regulations. As to matters actually happening, under both, it would be right, perhaps, to take the one as explanatory of the other; but when these facts took place, the former proclamation was the only *order* on the subject, the case must be governed by that, and to quote the last proclamation will only perplex the case."

CARR, R. *contra* "The right to all prizes vests in the king *jure coronæ*, but by the 33 Geo. III. c. 66, it is vested in the captors, subject to the proclamation of his majesty, to be divided as in that proclamation shall be directed; and Admiral *Harvey* must bring himself within the terms of the proclamation, or he can have no title. In order to confer a title to the *flag-eighth* on any flag-officer, it is necessary that he should not only be in the command, but that he should either be present at the capture or *directing or assisting*; in other words, this *flag-eighth* is given to him for some service which is supposed to be done by him, or by him to whom he succeeds, and therefore if the captain from necessity makes a capture without the command or assistance of his flag-officer, the whole of the *flag-eighth* belongs to him, and not to the admiral. As to the question of fraud, it is clear there was none committed. Captain *Milne* acts entirely without orders, as appears by his letters. Look to the facts, and it cannot be said that Admiral *Harvey* was *directing or assisting*; for his very directions would have defeated the capture. He tells Captain *Milne* to wait for the *Ariadne*, and that ship did not arrive till ten days after he quitted *St. Kitts*. Almost all the cases applicable to the subject are collected in *Johnstone v. Margetson*,* and in *Lord Nelson v. Tucker*,† after disposing

* 1 H. Bl. 261.

† 4 East, 261.

of Lord *St. Vincent's* claim to recover, the court said, that as Lord *Nelson* was privy to the orders given, and might have countermanded them, and did not, he must be considered as having virtually confirmed and renewed those orders; and in that respect may be fairly deemed, by *direction* and *assistance*, to have co-operated in producing the capture in question. But here the very contrary is the case. In the case of the *Orion*, the fact was, that Sir *T. Williams*, who was under the command of Admiral *Kingsmill*, in *Ireland*, and had come to *England*, had received orders from the admiralty to perform a certain service on his return and then to join Admiral *Kingsmill*, in the course of which service he took a prize; and Sir *William Scott* held, that the admiral was not entitled to the *flag-eighth*. And he said that supposing there was a continuation of subjection to the command of Admiral *Kingsmill*, yet the facts do not bear him out in his claim; and even if it were a criminal violation of orders, it would be very difficult to found Admiral *Kingsmill's* claim on that ground under the proclamation: although the law would not permit a wrong doer to take the benefit of his wrong.

DAUNCEY, in *reply*. From the letters of Captain *Milne* it must be inferred that he supposed himself to be acting under the implied orders of Admiral *Harvey*, and that he thought if the admiral had been acquainted with the circumstances, he would have given him orders to do what he actually did. The case of the *Orion* does not apply, because there the captain had received other orders from the admiralty. Here the captain was doing only that which some ship under Admiral *Harvey* must have done, and which Admiral *Harvey* would have ordered him to do, had he been

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acquainted fully with the necessity of the case; and although actual orders from the admiralty, will take a captain from under the command of his admiral, as in the case of the *Orion*, yet the mere ratification and approbation of the admiralty will not do so. And if it is permitted to an officer to carve out of his situation under an admiral a right to go off his station, for the benefit of the service, and quit the command of his superior officer, although no injury has happened in this case, and may not in many others, yet it is a liberty so open to abuse, that the benefit of the service requires that it should be prevented. It would afford a strong temptation to every captain to disregard the orders of his commander.

Lord ELLENBOROUGH, C. J. "The question in this case is, whether the *plaintiff*, Admiral *Harvey*, can be considered as a commander in chief, entitled under the proclamation to recover any, and what sum. His title is in respect of the being on board or *assisting* in the capture, and the question will be, whether the facts of this case will constitute him commanding officer acting in either of those situations? Now, his being on board is clearly out of the case; and with respect to the other alternative, let us see what is the station of Captain *Milne*. He receives orders originally from Admiral *Christian* on his situation. He states in his letter that his orders were to lie off *Demarara*, for the protection of the trade and the colony there. He never received any other orders from Admiral *Christian*, or any *dispensation* from the literal obligation of those orders. At the instance of the governor and the merchants of *Demarara*, he thinks it for the benefit of the trade, and for the protection of the commerce of the country, to undertake to convoy the merchantmen lying at *Demarara*, on their way to *Europe*. He proceeds therefore in disobedience, but in venial disobedience to the orders which he had

received, as appears by the subsequent approbation of the *Admiralty*, to convoy the trade from *Demarara*, and with an intention to go to *St. Kitts*. When he arrives there, a further necessity arises of proceeding on with the convoy; and from the statement of several respectable inhabitants and merchants there, he is induced to proceed in further disobedience of orders to convoy this fleet further on its way home. He has by this time orders that the *Madras* is appointed to succeed him on his station, so that he not only commits a disobedience in leaving the place without defence, but also in these subsequent orders to wait for the *Madras*. However, for the benefit of the service at the application of the Merchants at *St. Kitts*, he does take the ships under his convoy to *England*. Now inasmuch as he acts in direct contravention of all the orders, the effect of which I have stated, can it be said that he who was no otherwise under the command of Admiral *Harvey* than as he was the superior flag-officer who had succeeded to the station, is acting under the orders of *Admiral Harvey*? He is only so in respect of his coming on the same station, and adopting the orders under which the captain is presumed to act, but the *Ariadne* is ordered to convoy the fleet home. Can that which is then contrary to the directions of the commanding officer, whose orders if obeyed, would have been the means of frustrating this very capture, can that, I say, be construed, to fall under this description in the proclamation, and to be *directing* and *assisting* in that capture? Captain Milne must be considered as if he did that which he thinks he is responsible to the *Admiralty* for, or to the commander whom, when at *St. Kitts*, he finds to be the *Admiral*, and who represents his conduct to the superior authority of the admiralty-board, as being against his orders, but yet so much for the benefit of the service that he recommended him to their particular favour. In the

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case of the *Orion*, it is truly stated that these words of the proclamation are to be considered as the title-deeds under which the party is to claim. If these words are intelligible in themselves, I am for not putting upon them any forced construction arising from any usage to alter the plain meaning, and I am glad the courts have adopted that rule in order to give them a fair and not a fanciful construction. But if we were inclined to do so, there is no custom or usage stated; we have nothing but the words of the proclamation stated, and the facts as applied to them. We therefore think that the acts of Captain *Milne* not being in obedience to the orders of Admiral *Harvey*, by which alone, either actually or by implication, he can be considered as assisting in the capture, Admiral *Harvey* is not entitled to recover in this action. And it makes no part of the question here, whether in fact the *defendant* can be entitled, as *Captain*, to retain the money which is the produce of the share or prize which he has taken; but as between him and Admiral *Harvey*, he alone is entitled at present to retain the money."

GROSE, J. "It is not a question whether what the Captain did, was either wrong or right. He thought he was acting for the advantage of the service, but whether in fact he was so acting for the advantage of the service, is immaterial; and the question comes into the narrowest compass in the world; for Admiral *Harvey* says, he does not think him to have been acting under his orders, nor does the *defendant* think himself so doing, but considers the whole of his conduct as a violation of orders. I consider, therefore that this case does not fall within the plain meaning of the words in the proclamation, and the opinion laid down in the case of Lord *Nelson v. Tucker*, is, that the words of the proclamation are to be understood in the plain sense and meaning thereof."

LAWRENCE, J. "I am of the same opinion. The

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argument most urged in favour of the *plaintiff* is, that Captain *Milne* continued under the command of Admiral *Harvey*, and that being so, whatever was done must be considered to have been done under his command. Now I do not see any thing to shew that the proclamation should be understood otherwise than in its plain sense; and the proclamation says, "that, if such capture is made by any of his majesty's ships or vessels, under the command of a flag or flags, the flag-officer or officers, being *actually* on board, or *directing* and *assisting* in the capture, shall have one-eighth of the said three-eighth parts." As to the words, *acting under the command*, it certainly would not follow from thence that Admiral *Harvey* is entitled to the flag-eighth; and it comes to the question, whether he gave any orders, or was *assisting* in this capture? Captain *Milne* is first stationed at *Demarara*, to protect the Colonies. He comes away from thence, thinking it right for the benefit of the service. He comes to *St. Kitts*, where he finds a necessity of proceeding further, and he yields to it, and comes home with the convoy, but certainly not under the authority of Admiral *Harvey*. So far even from approving of it, he regrets that he went to *St. Kitts* at all. Then the merely being under the command of the admiral is not sufficient, under the proclamation, to entitle him to the *flag-eighth*; for the proclamation requires in terms the *direction* and *assistance* of the *flag-officer*. Here the captain, on the contrary, venially *broke* the orders which he *actually* received from Admiral *Harvey* and in the language of his own letter, the *plaintiff* does not consider him, according to my understapding, as acting under his authority or command.

LE BLANC, J. "I should not have been sorry if I could have been borne out by the authorities to say, that Admiral *Harvey* was entitled; because, I think, it would be better for the service in general if we could

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say, that no person who acts contrary to orders, shall be entitled to more than he would in case of obedience to them. But I cannot say, that according to the proclamation, the captain is acting under the orders of Admiral *Harvey*. The counsel for him was driven to shew that he was acting under the orders of Admiral *Harvey*, but that cannot be so considered. Admiral *Harvey*, on the contrary, gives no approbation of his conduct. The letter wrote by him to the admiralty clearly shews he never approved of what Captain *Milne* had done; but at any rate he never intimates that what he had done was by his command, or with his subsequent approbation; but he laments, that he did not remain on his station, and wait for the *Ariadne*. Now, unless we can consider that a person acting in direct violation of the orders of his superior commander, is to be supposed to be acting under his orders, we cannot say that the *Admiral* has here given his direction or assistance; though I should think that if he did any thing which could be referred to the orders of the *Admiral*, though he had not given express and particular orders for that purpose, it might be said to have been done with his assistance and under his command.

JUDGMENT FOR THE DEFENDANT.

Goss against HARRISON—Feb. 17.

Goss against DRAKEFORD.—(Bail of Wm. Harrison.)

Semble, Where the bail are let in upon terms to try the case of the principal, the money levied to abide the event, and the bail-bond to stand as a Security; the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail was first let in to try upon terms.

THIS was a rule to shew cause why the *fi. fa.* executed in this cause should not be set aside, and the money levied be restored to the *defendant*; and why Mr. *Wooley*, the attorney for the *plaintiff*, should not pay the costs of the application. The case was as follows: *Drakeford* had justified bail; notwithstanding which, the *plaintiff* levied an execution against the principal. A motion was then made why the execution and proceedings should not be set aside for irregularity. On hearing which, it was ordered that the money paid into the hands of the sheriff, should abide the event of the original action. One cause of complaint on the present motion was, that having levied the former execution, and the money being paid into the hands of the sheriff, and the rule being made that it should abide the event of the original action, the *plaintiff* had taken that money, and also levied another execution. Judgment was obtained against the bail regularly, and also a verdict against the principal, the amount of which with the costs considerably exceeded the money due at the time when the execution was originally taken out against the bail. The costs were 4*l.* The original debt 40*l.* and upwards, and the penalty in the bail-bond only 80*l.* Execution had been taken out for more than this penalty, and the *plaintiff's* counsel contended that it was right. For had the execution been ordered, to stand at first, the debt and costs would have been satisfied; and the bail-bond now stands as a security up to the penalty for the costs after that time. The *plaintiff* had received above 80*l.* in the whole, but not exclusive of what was paid into court.

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MARRYAT, *contra*, observed that it was not the bail who were to stand as security; but the bail-bond was to stand as a security.

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The whole was referred to the master, but THE COURT thought that the bail could be bound only to the amount of the bail-bond.

CHAMBERS against CAULFIELD, — February 11.

Where a husband and wife entered into a deed with a provision that in a certain event, and upon the consent of trustees, the wife should be permitted to live separate, and she did live separate from her husband, but without the consent of the trustees, and then committed adultery; held, that the husband might bring an action for criminal conversation against the adulterer; notwithstanding the authority of *Weedon v. Timbrel*, 5 Term Rep. 357. Query, how far upon principle that case is law?

CHAMBERS

versus

CAULFIELD.

THIS was an action for criminal conversation by the defendant with the wife of the plaintiff, tried before Lord ELLENBOROUGH, C. J. at Westminster, the sittings after last Michaelmas term. The adultery being proved for the plaintiff, the counsel for the defendant put in a deed of separation, dated the 18th of August, 1798, which was before the acts of adultery proved; and contended upon the authority of the case of *Weedon v. Timbrell*,* that the plaintiff should be non-suited. The counsel for the plaintiff contended that the adultery, though not actually proved at that time, might be inferred from circumstances, and under the direction of his lordship, found a verdict for the plaintiff, with very large damages; although there were some letters produced on the part of the defendant, in order to shew some misconduct and violence on the part of the plaintiff towards his wife.

This indenture is set out in the second vol. of Mr. East's Reports, p. 283, in the following terms, and throughout the argument this copy of the deed was referred to.

* 5 Term Rep. 557.

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By indenture of the 18th of August, 1798, made between George Chambers, the plaintiff, of the first part, the Honourable Jane Chambers, his wife, of the second part; George, Lord Rodney, and J. Rodney, of the third part; and J. Milbank, since deceased, of the fourth part; after reciting that Sir W. Chambers, knight, made and duly executed his will, dated the 19th of June, 1796, and that he thereby bequeathed the said Jane Chambers, his son's wife, an annuity of 200l. so long as she should continue to live in wedlock with her said husband, or in case of his death continued unmarried; but in failure of either of these conditions, her said annuity should cease and be void from the day of such failure; and he, Sir W. C. appointed T. C. G. A. and R. R. executors, &c. and died, &c. and his executors duly proved the will; and further reciting that Jane Chambers, in her right, was entitled to a pension of 100l. granted by an act of the Irish parliament, passed in 1780, and payable to her as one of the younger children of the late George Lord Rodney, during her life: and further reciting that divers differences had lately arisen between the plaintiff and Jane his wife, and that the plaintiff, in order to put an end to such differences, and to induce the said Jane, his wife, to continue to live with him, had agreed to treat her with all due kindness and regard, and to enter into the covenants and agreements thereafter contained, subject to such conditions and restrictions as are therein after mentioned: it was by the said indenture witnessed, that in pursuance of the said agreement and in consideration of 10s. &c. G. Chambers, and Jane, his wife, bargained, and assigned to the said Lord Rodney and J. Rodney, their executors, &c. the said annuity of 200l. bequeathed to the said Jane by the said recited will of Sir W. C. and also the said pension of 100l. and all arrears and future payments thereof, &c. UPON TRUST, as to the said pension of 100l. to pay the same

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unto the said *Jane Chambers*, or her appointee, in writing, for her sole and separate use, whether she continued to live with her husband or not, and that it might not be subject to his debts, controul, &c. And as to the said annuity of 200*l.* in trust from time to time, so long as the *plaintiff* and *Jane* his wife should live together, to apply the same, or so much thereof, as the said *trustees*, or the survivor or executor, &c. should in their discretion think necessary, in the purchase of wearing apparel, and other necessities for the said *Jane Chambers*. And as to so much of the said annuity of 200*l.* as the said *trustees*, &c. should not deem necessary to be applied to the purposes last mentioned, in trust, to pay the same to the *plaintiff*, his executors, &c. And upon further trust, in case any separation should take place between the said *plaintiff* and *Jane*, his wife, with the approbation of the trustees and *J. Milbank*, or the survivors or survivor of them, &c. or in case of the death of the *plaintiff*, in the life-time of the said *Jane Chambers*, then and in either of the said cases, and so often as it should happen, that the said Lord Rodney and *J. Rodney*, and the survivor of them, should from time to time pay the whole of the said annuity of 200*l.* as the same should be received by them in such and the same manner, for the benefit of the said *Jane Chambers* as therein before, was directed touching the said pension of 100*l.* And the *plaintiff* did thereby for himself, &c. covenant to and with the said Lord R. and *J. R.* their executors, &c. that in case future differences should arise between the *plaintiff* and the said *Jane*, his wife, and she the said *Jane* should on that account at any time thereafter find it necessary to live separate and apart from him, he the *defendant* should permit and suffer her to leave him, and from time to time, and at all times thereafter, to live, inhabit and reside separate and apart from him,

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in such place, or in such family as she should think proper; and should not prosecute, disturb, or molest the said *Jane*, or any person in whose house or family she should reside on account of her remaining separate and apart from him the said *G. Chambers*, subject nevertheless, to the condition or proviso in that behalf thereafter contained; and moreover, that in case the said annuity of 200*l.* thereby assigned should at any time during the life of the said *Jane*, cease to be payable to the plaintiff, his heirs, &c. should pay unto the said Lord *R.* and *T. R.* &c. from thence during the life of the said *Jane*, one annuity of 200*l.* from the time the said annuity, under the said will, should cease: upon trust that they should pay the same to and for such and the same intents and purposes, and in such and the same manner as therein before directed with respect to the said annuity of 200*l.* thereby assigned, &c.

In the declaration in that case, the plaintiffs Lord *R.* and *T. R.* averred that *Milbank* was dead, and that after his death, to wit, on the 10th day of *August*, 1799, a separation did take place with their approbation:

DALLAS, for the defendant, in this term, obtained a rule to shew cause why there should not be a new trial, on the above ground, that the verdict was against law; and also on the ground of excessive damages. Lord *ELLENBOROUGH* C. J. when this rule was granted, desired him to consider the case of *Weedon v. Timbrell* upon principle, and not to treat it as a decisive authority.

ERSKINE, *GARROW*, and *SCARLET*, for the plaintiff, now shewed cause, and contended that this case did not fall within the case of *Weedon v. Timbrell*. Lord *Kenyon* said, that case was not founded upon any precedent; but that upon principle, he thought that if the parties were separated, the husband could not complain of the loss of matrimonial comfort and society. Upon that case

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therefore, whatever be the cause of separation, the husband cannot bring an action for adultery in case of separation; but suppose there is a private marriage, and the wife lives for some time with her father, who gives her a fortune upon condition that she lives separately from her husband for a limited time; then, according to the case of *Weedon v. Timbrell*, there is no drawing the line, and if the act of adultery takes place during the separation, but the husband does not know of it till afterwards, there can be no action against the adulterer. Although the *plaintiff* declares on a *per quod*, that he lost the comfort and society of his wife, yet there are other things in which the matrimonial comforts may be destroyed than in the mere loss of the society of the wife; or she is rendered unfit to have the care and protection of his children. Though if the separation were for misconduct on the part of the husband, the action might well be said not to lie, yet the case of *Weedon v. Timbrell* stands merely upon the ground of separation. The case of an action by a father for seducing his daughter somewhat resembles indeed the case of an action for criminal conversation; but there it proceeds upon the supposition, that the father is the *master* of the child and uses her services, whereas there is no such supposed relation of master and servant here.

LAWRENCE, J. "They resemble each other in this, that they are only maintainable on the ground of the special damage, although the special damage in the one case is not in fact made out as it is stated.

LORD ELLENBOROUGH, C. J. "Is it not as much a part of his aid and comfort that the wife should educate his children in virtue and good conduct as that he should have her society and sensual enjoyment? As to the form of the action, it occurs to me to mention only that the action is in *trespass*, because of the

injury as to the person of the wife; now in ordinary cases of trespass, the wife ought to join in the action but she does not join, because though it is a trespass on her person, yet the action is brought for the special injury which the husband receives. The words in the declaration are, that he lost the *comfort, society, and assistance* of the wife, which he ought to have had."

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On the 10th
of the 10th
of the 10th

ERSKINE. "Even upon the terms of the deed, a distinction may be raised; for it is not a deed to let the wife loose at all events; it is only a qualified license to live separate upon a certain proviso."

DALLAS and BURROUGH, *contra*. "This case falls within the doctrine of *Weedon v. Timbrell*, supposing that case to be law.—The action for criminal conversation is not an action of *trespass vi et armis*, but of trespass on the case for the special damage; that is, for the loss of the society of the wife. Up to the 18th of August, 1798, the letters of the *plaintiff* shew that he was the culpable author of the separation. In the first instance, indeed, it was a deed to bring the husband and wife together and so far differs from *Weedon v. Timbrell*; but as there is a covenant that in case of his ill behaviour to his wife, she may live separate, and she is to be the sole judge of the propriety or necessity of doing so, when she does separate under this covenant, there can be no difference between this case and *Weedon v. Timbrell*; for they are at the time of the adultery living apart under the provisions of a deed of separation, and whether that deed was originally absolute or conditional must be immaterial; and that it was a deed of separation, and lawful, was decided in the case of *Madney v. Chambers*,* in this court."

Lord ELLENBOROUGH, C. J. "Most of the judges

* 2 East. 233.

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OF
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in that case thought that it was rather a deed to bring the parties together than to separate them."

LAWRENCE, J. "The court in that case thought that it was a good covenant for the separation, because it was referred to a *domestic forum*, to say in what case it would be right for them to be separated; and it came on upon admission that they were separated by the consent of the trustees. You mistake in supposing the court to say that an independant covenant for a wife to live apart from her husband whenever she chooses is a good covenant. We did not decide any such thing. I know that I went at least, if the other judges did not, and I believe they did, upon that ground, that the parties had instituted a sort of domestic forum by which it should be tried and determined when it would be proper for them to be so separated. We never said that a covenant for the wife to quit the husband whenever she thought fit, would be good."

Lord ELLENBOROUGH, C. J. "That would be, in fact, to make the husband a tenant at will to the wife for all his marital rights."

LAWRENCE, J. "Consider two questions as arising here; first, whether the deed is not a restraint upon the wife from quitting her husband, except with the consent of her trustees, and secondly, whether, if it is not such a consent, it can be good."

BURROUGH. "These are independant covenants. And not merely upon the authority of the case of *Weedon v. Timbrell*, but from the very nature of an action upon the case, it is clear, that it can only be maintained for the special injury, the loss of the society and comfort of the wife. If it were not for that, the party could only proceed in the common *pro salute animi*. And whether the deed is good or not,

yet the mere separation in fact is equally a bar to this action."

1802.

Chancery
Court
Chancery

LAWRENCE, J. "Is it not evidence of the loss of the assistance of the wife by means of this misconduct of the *defendant* if the *plaintiff* is in any wise injured by the want of her aid in the education of his children."

GROSE, J. "Separation in fact is not the same as if she lived apart under the provisions of a deed; for it will alter the case materially if she lives apart on account of the adultery. And the two youngest children were to live with her."

LORD ELLENBOROUGH, C. J. "I certainly put it to the jury to say, that this interrupted their reconciliation; and that it deprived the husband of the assistance of his wife in bringing up the children."

The COURT took time to consider, and on this day judgment was delivered to the following effect by

LORD ELLENBOROUGH, C. J. "This was an action for criminal conversation, and it came before the court on a motion for a new trial on *Saturday* last. It is unnecessary to say any thing more respecting the deed of the 18th of August, 1798, than that it seems not to have been meant to provide for any separation, but such as should be with the approbation of the trustees, for it assigns two annuities to Mrs. *Chambers*, one settled by an act of the Irish parliament of 100*l.* a year, and another of 200*l.* left by the will of Sir *William Chambers*, as long as she should live with her husband, or continue single. Then 200*l.* *per ann.* is allowed for clothes, and then after some provisions respecting the trustees, &c. comes the clause which puts it in the power of Mrs. *Chambers* to leave her husband if she should find it necessary, and one by which *Chambers* covenants to permit her to live separate and apart from

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Chambers v.
Trustees,
Guaranty Co.

him; also that it shall be lawful henceforth to have and enjoy her household furniture, jewels, &c. to the amount of 500l. and moreover, in case any of the 200l. ceases to be payable to pay to the trustees a like annuity, upon like trusts, &c.; then follows a clause that in case of a separation with the approbation of the trustees, Mrs. Chambers might take the two youngest children to live with her; then a provision for certain allowances for the children to be with Mrs. Chambers, and a covenant that Chambers should cause to be done every other act to confirm such separation; and afterwards comes the covenant in case of separation to indemnify him, &c. Then follows the proviso referred to.

- Now taking the whole of the deed into consideration, it is evident that no separation was in the contemplation of the parties without the approbation of the trustees; for not only the interest of Mrs. Chambers, but that of her children is concerned, and if the deed is construed to give her a power of separation without the approbation of her trustees, all the purpose of the deed would be destroyed. She would have no claim for 200l. a year, for the trustees have no power to apply it except in the event of a separation with their approbation. In the next place, the interest of the children would be unprovided for; and lastly, Mr. Chambers would have no indemnity against her contracts, which are in the other case provided for. And not only those consequences would follow, but this very absurd one, that if she left her husband without the consent of her trustees, she would take property to the amount of 500l.

If therefore, the deeds cannot be held as providing for the separation without the approbation of the trustees the consequence of Mrs. Chambers having left her husband without the approbation of her trustees is, that she cannot be considered, at the time, as living separate from him with his consent; and of course the

event has not taken place, and therefore the plaintiff's right to recover is not affected by this deed. And if she did leave her husband without his approbation, he has not, as in the case of *Weedon v. Timbrell*, given up the comfort and society of his wife; consequently, the case of *Weedon v. Timbrell* cannot be considered as an authority for disturbing the verdict. As to the second ground, namely, the damages, if it appeared to us that the amount of the damages compared with the facts proved, was extravagant, and that the jury must have acted from undue motives, or from misconception, we should have thought it our duty to have submitted the question to a second trial. But this does not appear in the present instance, upon a review of all the circumstances, to be the case: therefore the

1805.

CHAMBERS,
VERSUS
CAULFIELD

RULE for a new trial must be DISCHARGED.

FLETCHER against WILKINS and Another.—Feb. 11.

Held, that the stat. 24 Geo. II. c. 44, s. 6, does not extend to actions of replevin; they being proceedings in rem. to which the provisions of that statute are inapplicable, and would go wholly to defeat the object of the suit to recover the goods.

FLETCHER
VERSUS
WILKINS

PLAINTIFF declares that defendants, on the 4th of August, at the parish of Shipton-under-Whichwood, in the county of Oxford, in a certain place there called Milton Cow Common, took the cattle, to wit, four cows, of plaintiff, and the same unjustly detained against sureties and pledges, until, &c. wherefore plaintiff saith he is injured, and hath sustained damages to the value of 50l. &c. therefore, he brings his suit, &c. AVOWRY and COGNIZANCE. Defendants, Williams and Bridge, as overseers of the poor, and defendant Rawlins, as churchwarden of the hamlet of Milton, in the said parish of

1803.

FLETCHER
versus
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Shipton, in the said county of *Oxford*, well avow, and *defendant Herbert*, as their bailiff, well acknowledges the taking of the said cows of the *plaintiff*, in the said place, in which, &c. and justly, &c. because they say that before and at the said time, when, &c. the said place, in which, &c. was, and still is situate, within and parcel of the hamlet of *Milton*, in the parish aforesaid; that before the said time, when, &c. to wit, on the 21st of *July*, 1802, a certain warrant was then and there made by and sealed with the respective seals of *Francis Pouston*, Esq. and the Rev. *Charles Watts*, clerk, then and still being justices of our Lord the King assigned to keep the peace of our said Lord the King, in and for the said county, [here the warrant was set out, being a warrant of distress, for 34l. 13s. 5d. for the arrears of a poor's rate] which said warrant afterwards and before the times, when, &c. to wit, on the same day and year last aforesaid, at the parish aforesaid, was delivered to *defendants Wilkins, Bridge, and Rawlins*, to be duly executed, and said *Wilkins and Bridge*, at the same time when, &c. being overseers of the poor of the said *Hamlet*, and said *Rawlins*, being &c. then and at the same time, when, &c. to wit, on the same day and year aforesaid, requested the *plaintiff* to pay the said sum of 34l. 13s. 5d. and because the *plaintiff* then and there refused to pay them the same or any part thereof, which then and at the said time when, &c. remained wholly unpaid, and the said *Wilkins and Bridge*, so being such overseers, as aforesaid, and said *Rawlins*, so being such church-warden as aforesaid, well avow, and the said *Herbert*, their bailiff, and by their command well acknowledges the taking of the said cows, at the said time, when, &c. in the said place, in which, &c. and justly, &c. for and in the name of a distress for the said sum of 34l. 13s. 5d. so due and in arrear as aforesaid, and which is still wholly unpaid, to wit, at the parish aforesaid. And

The said *defendants* further say that no demand in writing by the said *plaintiff*, or by his attorney or agent, hath been made or left at the usual place of abode of the said *defendants*, or either of them, of the perusal and copy of the said warrant, for the space of six days before the commencement of this suit, and this the *defendants* are ready to verify, wherefore they pray judgment and a return of the said cows to be adjudged to them, &c. *Plea in bar* that there was no such rate, and also a further *plea in bar* that public notice of the rate was not given in the church. To this the *defendants* replied, that there had been an appeal against two rates, which appeal was respited to the 12th of January, 1802; when by an order of sessions, the said two rates and all intermediate rates were quashed, and a survey was ordered to be made, whereby it appeared that the *plaintiff* had been under rated \$4l. 18s. 6d., which sum the *plaintiff* became liable to pay, and the same being demanded by the overseers, &c. a summons was served on the *plaintiff* to appear before two justices to shew cause why he refused to pay the same; that he appeared and not having shewn sufficient cause, and the same remaining due and unpaid, the said warrant was issued.

Rejoinder, that in and by the said order in the said replication mentioned, it was ordered by the said court, by and with the consent of the said appellants and respondents, that a new rate for the relief of the poor of the said hamlet should be immediately made and formed upon and according to the said valuation of the said *John Davis*, in the said replication mentioned, and that said two rates or assessments, so appealed against as aforesaid, and all intermediate rates, should be quashed, and the payments of the several persons charged and assessed thereto respectively, should be regulated and appropriated by and according

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to the said valuation, and the new rate to be made and formed thereupon, as by the said order more fully appears, and the *plaintiff* further saith, that no new rate for the relief of the poor of the said hamlet, was immediately or at any time after making the said orders and before the making of the said warrant, in the said avowry and cognizance mentioned, made, or formed upon and according to the said valuation, nor did the church-wardens and overseers of the poor of the said hamlet of *Milton* or any or either of them, give or cause to be given public notice in the church of any such new rate as aforesaid, according to the statute in that case made and provided, and this the said *plaintiff* is ready to verify, wherefore inasmuch as *defendants* have above avowed and acknowledged the taking of the said cows, in the said place, in which, &c. *plaintiff* as before prays judgment, and his damages by reason of the taking and unjustly detaining thereof to be adjudged, to him, &c.

To this the *defendant's* demur ;

For the following causes, viz. that *plaintiff* hath not in or by his said rejoinder admitted, traversed, or denied that the said sum of 34l. 13s. 5½d. in the *avowry* and *cognizance* and replication mentioned, was rated, assessed or increased on him as therein mentioned, but hath in and by his said rejoinder attempted to put in issue other and immaterial facts, wholly irrelevant to the question respecting the right of *defendants* to distrain the said cows, under and by virtue of the said warrant for the said sum of 34l. 13s. 5½d. so increased on *plaintiff* as aforesaid.

JOINDER in demurrer, &c.

ABBOTT for the *plaintiff*. "The question in this case is, whether the statute 24 Geo. II. c. 44, s. 6, extends to an action of replevin. That statute enacts, that no action shall be brought against any constable, head borough, or other officer, or against any person or

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persons acting by his order, and in his aid for any thing done in obedience to any warrant under the hand or seal of any justice of the peace, until demand hath been made or left at the usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected by the space of six days after such demand, &c." Now it is not denied but that if this was an action of trespass, it would have been necessary to have given notice under this statute. The case of *Milward v. Caffin*,* in which it is said to have been decided otherwise, does not seem to have been much discussed; and Lord C. J. *De Grey* thought that there were two objections to the plaintiff's recovering there; first, that the statute does not apply to an action of replevin; and next that it did not apply to a distress for a poor's-rate; but the latter point is clearly ruled otherwise in *Harper v. Carr*;† and though Lord C. *De Grey* says it was never held that the statute does apply to an action of replevin, it appears now that he was, in point of fact, mistaken. For in *Willes's Reports*, which were not published then, it appears that antecedently to the case of *Milward v. Caffin*, in the case of *Pearson against Roberts*,‡ it was expressly so decided; and the statutes 8 Hen. VIII. c. 4, s. 3, and 17 Car. II. c. 7; and 4 & 5 Anne, c. 16, were there referred to in order to shew that replevin is an action.

Lord ELLENBOROUGH, C. J. "Lord C. J. *Willes* speaks of two sorts of replevin, and of a replevin to recover damages; now is there any other sort of replevin than that upon the statute of *Marlbridge*?"

* 2 Bl. Rep. 1330. + 7 Term Rep. 274.

‡ *Willes's Reports*, 668.

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GROSE J. "Does not G. R. Gilbert speak of an original writ out of Chancery in replevin?"

ABBOTT. "That is only by writ of *justities*. In all actions of *replevin*, the plaintiff claims and recovers damages. In *Harper v. Carr*, Lord *Kenton* said, that if it had not been for the case of *Milward v. Coffin*, he should have thought that the act extended to *replevin*. And it seems reasonable that it should, for otherwise the party would have an opportunity of avoiding the effect of the statute by bringing his action in a particular form."

LORD ELLENBOROUGH, C. J. "What was the mode of replevying before the statute of *Marlbridge*, or rather what was the common law remedy? Is there any other *replevin* than by *pone* or by writ of *justities*?"

ABBOTT. "It must be a writ of *justities*, the form of which is in the *Register* 81, and in *Fitzherbert's Natura Brevium*, 68. It is contended, that this statute would go to deprive the party of his remedy by *replevin*, because the constable may sell the goods in the mean time before the six days expire. But though it may be right in some cases to allow of the remedy by *replevin*, in other cases it may not; and particularly, in such a case as this, where the party has been heard upon the appeal before the justices, and the distress is very much in the nature of an execution. And the general terms of this section of the statute are clearly extensive enough to comprehend this as well as other actions."

TAUNTON, *contrà*. "The argument founded on the case of *Harper and Carr* may be put out of the case, for the question there was, whether an overseer or churchwarden was within the protection of the stat. 24 *Gen. II. c. 44*, but I do not proceed upon that ground, but contend only that *replevin* is not an action within that statute. And *Harper v. Carr*, is not in opposition to the case of *Milward v. Coffin*, which does not say

that an overseer is not within the act, but merely that *replevin*, being an action in *rem*, is not within it. If the statute applies, this consequence follows; by the stat. 27 Geo. II. c. 20, s. 1, justices are impowered in all cases where they have power to issue a warrant of distress for the payment of money, to order the goods to be sold in not less than four days, and within eight days; and by the stat. 24 Geo. II. c. 44, no writ shall be issued against a justice until he shall have had one month's notice: so that it is impossible for the party grieved to have his remedy by *replevin*; although in case of a poor's rate that remedy is expressly given by the stat. 43 Eliz. c. 2. So by the 24 Geo. II. c. 44, no writ shall be sued out against any justice of the peace &c. nor any copy of the *process* at the suit of a subject *served*, &c. Now *replevin* is commenced by writ of *justicies*, or by *pone* which are not served on the justices, and the statute further provides for the justice paying money into court, and tendering amends, which is all very inconsistent with the nature of a *replevin*. In *Pearson v. Roberts*, although it appears at first sight that the decision of the court was, that the action of *replevin* was within the statute, yet from the language of WILLES, C. J. it appears that this particular form of the action is expressly distinguished. For he says, 'this argument,' namely, that *replevin* is not within the statute, 'arises from a mistake in not considering the nature of *replevins*, and that there are two sorts of *replevins*; one only to have the goods again, which may be by plaint in the sheriff's court, or a mandatory writ to the sheriff; and another by way of action, in order to recover damages.' I do not know to what Chief Justice *Willes* can allude; but perhaps it may be somewhat explained thus: if the goods are redelivered to the party, he declares only in the *detinuit*, and complains that the defendant unjustly

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detained the goods; but if the goods are *eloigned* and cannot be redelivered, then he *declares* in the *detinct*, and *damages* only can be recovered.* Perhaps therefore he meant to allude to this distinction as to the recovery of damages; but it applies both to suits commenced by writ of *justicies*, and by writ of *pone*. If C. J. *Willes* meant to allude to a writ which is to be served on the party, he must have been under some mistake. In *Pearson v. Roberts*, I suppose that it must have been an action of replevin, where there had been *no delivery* of the goods to the sheriff; but although the number of the *roll* is stated in that case, I have not examined it, and the declaration is not set out. Now this is a suit by plaint to have the goods again, and, as I take it, is the very case to which the court there said that the statute does not apply."

LORD ELLENBOROUGH, C. J. "You say that the act begins with stating the writ shall not be served until, &c. Now this writ begins with stating, 'whereas A. B. was summoned;' does not that imply a sort of service?"

TAUNTON. "I do not know how that may be in practice. But I take it, that *that* summons does not constitute him a party to the suit. Under these difficulties, it would be a great inconvenience to the party if the writ of replevin should be taken away in this manner because it is not only the sole remedy by which a man can recover a *valuable chattel in specie*, but it is a remedy *expressly* given by the statute of the 43 Eliz. c. 13, in case of a distress for a poor's-rate, and therefore if taken away ought to be done expressly, not *ex obliquo* as it were."

ABBOTT, in reply. "There would be great force in the argument that this statute would go to take away

* See *Gilbert's Law of Distresses*, edit. 1794, p. 160.

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the action of replevin, provided the party had no other remedy to pursue. But it is competent to him to bring an action of *trover* or *trespass*, in which the same inconvenience would not occur, and the only means by which he is said to be deprived of the replevin is, by the effect of the statute 27 *Geo. II.* which, as it is a subsequent statute to the 24 *Geo. II. c. 44.* cannot be considered as affecting the construction thereof, so as to prevent the words, which are very full and clear, from comprehending the action of *replevin*. The manner in which it has been attempted to explain the language of *C. J. Willes*, goes rather to confirm the opinion that the statute does extend to this case; for the action to which he says it does extend, namely, where damages are recovered, is the only action of replevin now in use."

LORD ELLENBOROUGH, C. J. observed that it was a point of very great consequence; for either the subject would loose a very important remedy by action of replevin in the one case; or the magistrate a very important part of his protection in the other view of the case; wherefore, the court took time to consider, and on this day the judgment of the court was delivered to the following effect, by LORD ELLENBOROUGH, C. J. after stating the case, and that by the amended pleading the *defendants* in their avowry state that no demand was made of the copy of the warrant six days before the action was brought; that there was a *frivolous* plea in bar, and that in the pleadings it was admitted that no such demand was made; "the question in this case is, whether the statute 24 *Geo. II. c. 44. s. 6.* applies to this case, the provisions of that statute being that no action shall be brought against any constables or head-boroughs for any act by them done in obedience to a warrant of any justice of the peace, until demand shall have been made of the per-

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and copy of the warrant, &c." In behalf of the plaintiff, the case of *Milward v. Caffin** has been cited, in which it was held that this statute does not apply to an action of *replevin*; and, on the other hand, the case of *Pearson v. Roberts* in *Willes's Reports*, 668, has been referred to, where in an action of *replevin* for cattle taken as a distress for not repairing the highways, Lord C. J. *Willes* makes a distinction between a *replevin* by plaint and a mandatory writ to the sheriff, to restore the goods, and an action of *replevin* to recover damages, and says, that in the latter case, the act clearly does extend to an action of *replevin*. In addition to this, there is an *obiter dictum* of Lord *Kenyon* in the case of *Harper v. Carr*, 7 T. R. 274, that if it had not been for the case of *Milward v. Caffin*, he should think the statute applied, because otherwise the parts might evade the statute by proceeding in a particular mode; and I cannot but feel the force of that observation. The case in Chief Justice *Willes's Reports*, however, goes upon a distinction, whether the plaintiff in the *replevin* is to recover the thing taken by the defendant, or only damages for the detention; but all the diligence of the gentleman who very ably argued this case at the bar on the part of the plaintiff, has not been able to discover any such mode of proceeding as is first alluded to by Chief Justice *Willes* as contradistinguishable from the second mode; for in all proceedings in *replevin*, whether by writ of *justicies*, or by plaint, in the sheriff's court, in both these modes of proceeding, the action is *in rem*, that is, to have the goods again; and if so, and there should be in fact no action of *replevin* merely to recover damages, then the case in *Willes's Rep.* will be an authority according to the reasoning of that case to shew that the 24 Geo. II. c. 44, does not extend to an action

* 1 Bl. Rep. 1331.

of *replevin*. The reason *ab inconvenienti* assigned by Lord Kenyon, why it should be construed to apply to *replevin*, has, indeed, considerable force; but on the other hand, the *inconvenience* of depriving the subject of this remedy by *replevin* would be at least equally great, since it is the only action by which he could recover any identical chattel of peculiar value to himself, and for which it would be difficult to afford him a compensation merely in damages. In addition to the authorities cited for the *plaintiff*, an argument very strongly in his favour arises from the construction of the 43 Eliz. c. 2, in which the right to levy the *poor's rate* by distress is originally given. For by that statute, s. 19, a form of avowry is given to the parties making the distress; and though it has been urged, on the other hand, that the distress for a poor's rate is in the nature of an *execution* by distress and sale, yet, when the right of *replevying* is so acknowledged by the statute, it would be going very far indeed to say that such a beneficial remedy to the subject should be *indirectly* taken away by the provisions of the stat 24 Geo. II. c. 44, and 27 Geo. II. c. 20, when the provisions of those statutes are so little adapted to the nature of a suit in *replevin*. Though it has been truly said, that prior to the 27 Geo. II. c. 20, a demand of a copy of the warrant might be made without the inconveniences, which would now result from it, yet it is not to be intended that the *legislature* would pass an act so as indirectly to defeat the remedy by *replevin*, which was expressly reserved in the former statute of the 43 Eliz. c. 2, s. 19. In truth the 27 Geo. II. c. 20, leaves the 24 Geo. II. c. 44, as it was before, and by the 43 Eliz. c. 2, the goods might have been sold under the distress immediately, so that if this delay by the demand of the warrant were allowed, the remedy in *rem* would even then be defeated. From the incongruity of the proceedings required by the 27 G. II. c. 20, with the provisions of the 43

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Esq. barrister at law, to settle all matters in difference in the said two causes between the said parties, and to decide between the said parties in the same manner as if the said two causes had been fully and in strictness of law tried.

May, 31. 1802,—Mr. *Puller* made his award, and thereby, after stating the said deed of the 24th of *June*, 1791, and also the deeds of lease and release, of the 25th and 26th of *September*, 1792, hereinafter particularly mentioned, and that *Wadham*, the testator, accepted the said lastmentioned conveyance, and that the moieties of the rent-charge, mentioned in the said declarations, were due and unpaid, awarded and adjudged in effect as follows. That in neither of the actions of covenant, the *defendant* was liable, either as assignee or executor of the said *John Wadham*, he not being liable upon the covenant by the said *Wm. Watts* to the said *plaintiff*.

The said arbitrator being thus of opinion that *John Wadham*, deceased, was not liable in law upon the covenant made by the said *Watts*, and of course if well founded in that opinion, that *defendant*, as the devisee of the said *John Wadham*, was not liable in law upon the said covenant, an application was made to this honorable court to set aside the said award, as being against law; and a rule to shew cause why the award should not be set aside was granted, and when cause was to be shewn against the said rule, the court ordered a case to be made for the opinion of the court upon the question of law, and directed extracts from the deeds, so far as they are material to the question, to be stated in such case, which is done as follows:

By certain indentures of lease and release, bearing date respectively the 23d and 24th of *June*, 1791, the release being made between *John Russ*, of the first part; the *plaintiffs*, of the second part; *Rachel*,

the wife of *John Punter*, of the third part; the said *William Watts*, of the fourth part; and *Thomas Coats* of the fifth part; and being the deed mentioned in the declarations, and in the award, the said *Russ* being seised in fee of one undivided third part of the said messuage and hereditaments, and the *plaintiffs*, being seised in fee of the other two undivided third parts, according to their several and respective shares, rights, and interests, therein did grant, and convey the said messuages and hereditaments unto the said *Thomas Coates*, and to his heirs and assigns for ever. The *habendum* in this deed is in the following words, viz.

To hold unto the said *Thomas Coats*, his heirs and assigns for ever, to the use of such persons for such estates, &c. as the said *Wm. Watts*, by any deed or writing under his hand and seal, &c. shall limit, direct, appoint, give, or devise the same; and for want of such limitation, and as soon as such limitation shall cease, and as to such parts *whereof* no such limitation, direction or appointment shall be made to the only proper use and behoof of the said *William Watts*, his heirs and assigns for ever, absolutely discharged from the several uses, trusts, limitations, provisos, and agreements, in the said indenture of settlement contained, &c. yielding and paying, and the said *Wm. Watts*, and by his direction the said *Thomas Coats* do grant out of the said messuages, and hereditaments, &c. unto the *plaintiffs*, their heirs and assigns for ever, the yearly fee-farm rent or rent-charge of 28l. &c. Covenant from the said *Wm. Watts*, that he, his heirs and assigns, should well and truly pay the said rent; also a clause of re-entry and distress. There was a further grant of a rent-charge of 14l. in like manner to the said *Russ*, making in the whole 42l.

25th and 26th of September, 1792.—By indentures of lease and release, the release between *Watts*, of the first part, I. S. a trustee for *Watts* as to

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other hereditaments of the second part; the said Coats, of the third part; *Wadham*, the defendant's, testator, who did not execute, of the fourth part; I. P. a trustee for *Wadham* and another to bar dower, of the fifth part; T. J. a mortgagee of a term of 1000 years, of the sixth part; and R. B. a trustee for *Wadham*, and another purchaser, named *Stephens*, as to the said term, of the seventh part; after reciting the said indentures, and the mortgage to *Jones*, and a contract of purchase of the premises by *Wadham* and *Stephens*, free from all incumbrance except the rent-charge of 42l. in consideration of 1000l. and also in consideration of an agreement to convey to *Watts* ground rents of a certain amount out of the first ground rents on the said ground, payable out of any other grant than that of the said 42l., and also reciting a part performance of the said contract.

It is witnessed, that in full performance of the said contract of the 18th of *May*, and in consideration of 500l. to the said *Watts* in hand paid by the said *Wadham* (being the same sum as in the said indenture of equal date is mentioned to be paid by *Lockier* to *Watts*) and in consideration of 500l. to said *Jones*, paid by *Stevens* by direction of *Watts*, the said Coates, by direction of *Watts*, did according to his estate and interest, bargain, sell, and release; and the said William Watts, did grant bargain, sell, alien, release, ratify, and confirm, and also limit, direct, and appoint unto the said *Wadham*, the testator, *Stevens*, and *Powell*, and to their heirs and assigns for ever, the said messuage and hereditaments comprised in the said indentures therein first before stated, and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, property, benefit, and equity and redemption, challenge, claim, and demand whatsoever both at law and in equity, and otherwise howsoever of the said William Watts and Thomas Coates respectively, and of each and every of them of, in, to, and

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out of the said *hereditaments and premises, and every part and parcel thereof*; to hold the same unto the said *Wadham*, the testator, and the said *Stevens and Powell*, their heirs and assigns, to the only proper use and behoof of the said *Wadham, Stevens, and Powell*, and the heirs and assigns of said *Wadham and Stevens*, for ever, as tenants in common; in trust, as to the estate of *Powell* for *Wadham and Stevens*, their heirs and assigns for evermore, as tenants in common; subject nevertheless as to the said messuage and hereditaments, called the *Blackmoor's Head*, to the payment of the said yearly fee-farm rent, or sum of 42*l.* reserved, and made payable in and by the said indentures of lease and release of the 23d and 24th days of *June*, 1791, therein before in part recited; and to the powers and remedies therein contained for enforcing the payment thereof when in arrear, and to the performance of the covenants in the said indenture of release contained, which thenceforth on the part and behalf of the said *Wm. Watts*, his heirs and assigns, ought to be paid, observed, and performed. And in the said indenture is contained the following covenant; and the said *J. Wadham and T. Stevens*, for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, and not jointly nor the one for the other of them, do and each of them doth covenant, promise, and agree to and with the said *Wm. Watts*, his heirs and assigns, by these presents that they the said *John Wadham and Thomas Stevens*, their heirs or assigns, shall and will, in equal shares and proportions, well and truly pay or cause to be paid the said clear yearly fee-farm rent of 42*l.* so reserved and made payable in and by the said indentures of lease and release of the — and — days of — 1791, herein before in part recited, upon the days and times and in manner and form as the same is therein and thereby reserved and made payable (that is to say, one moiety thereof by the said *John Wadham*, his heirs

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and assigns; and the *other moiety* thereof by the said *Thomas Stevens*, his heirs and assigns; and also shall and will, in like manner, in all respects, well and truly observe, perform, fulfil, and keep all and every the covenants, clauses, provisos, and agreements mentioned, expressed, reserved, and contained in and by the said last mentioned indenture of release, which from henceforth on the part and behalf of the said *Wm. Watts*, his heirs or assigns, are or ought to be observed, performed, fulfilled, accomplished, and kept; and of and from the payment of the said yearly fee-farm rent of 42l. and the performance of the said covenants, clauses, provisos, and agreements, and all actions, suits, arrests, attachments, executions, costs, charges, damages, and expenses for or by reason or means or on account of the same rent, covenants, clauses, provisos, engagements, and agreements, or any or either of them, or any part thereof or of any or either of them, or otherwise relating thereto, shall and will in the proportion aforesaid save, defend, and keep harmless, and indemnify the said *Wm. Watts*, his heirs, executors, and administrators, and every of them, his, their, and every of their goods, chattels, lands, and tenements, forever by these presents.

The said *Wadham*, the testator, died, not having parted with, sold, or any wise aliened the above mentioned premises, and left the *defendant* sole devisee in fee, of all his real estates, messuages, lands, and hereditaments, in possession, reversion, remainder, or expectancy, and of all his copyhold and personal estate and property, and appointed him sole executor thereof, the *defendant* proved the said will. The premises in question are not particularly mentioned in the will.

After the death of the said *Wadham*, the elder, one moiety of the said fee-farm rent of 42l. for three years, amounting to 42l. became due and still is wholly unpaid to the *plaintiffs*.

The question for the opinion of the court is, whether the *defendant*, as executor or devisee of the said testator, *John Wadham*, deceased, is liable in law to an action of covenant upon the said covenant by *Watts*, under the conveyances before stated? If the court shall be of opinion that he is, the rule for setting aside the award is to be made absolute, if not, it is to be discharged.

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DAMPIER, for the *plaintiffs*. "The only question in this case is, whether under the deed of the 25th of September, 1792, *Wadham* is liable as assignee? That depends upon whether these deeds operated merely as an execution of the power contained in the deeds of the 23d and 24th of June, 1791, or operated out of *Watts's* interest. Now, having a fee, defeasible only by the power of which he himself was the donee, and which operated only out of his own estate, that power was nugatory and absorbed in the fee, and the conveyance necessarily operated upon his (*Watts's*) interest. Secondly, supposing him to have both a power and an interest, the deeds of 1792 operated out of the interest, and not out of the power. The deeds of 1791 describe what interest *Watts* has. For the conveyance is to *Coats*, to the use of such persons as *Watts* shall appoint; and in default of his appointment, then to the use of *Watts* in fee, and according to the case of *Doe* on the demise of *Willis*, v. *Martin** he took the fee, defeasible by this appointment; if it is really an appointment; and this opinion, which was delivered by Lord Kenyon, is adopted by the Master of the Rolls, in the case of *Maundrell* v. *Maundrell*.† In *Goodill* v. *Brigham*,‡ this definition of a power was laid down, and adopted both by the Chief Justice and *Buller*, J.

* 4 Term Rep. 49, 64, 65. + 7 Ves. jun. 583.

† 1 Bos. & Pul. 195.

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namely, that it is an authority given to one person to be executed over the estate of another; but there is no case where the authority to be executed over the estate of the donee himself, and by himself, is a mere power."

LAWRENCE, J. "That comes to this question, whether the legal estate is in the person whom you call the donee, and who is the person to execute the estate."

DAMPIER. "A conveyance by any person who has an estate in fee, operates out of his estate; and not out of any power which is created artificially by the statute of uses. He has a vested estate in fee, subject to be divested by the power if he chooses to execute it. This is precisely the doctrine of *Doc dem. Willis v. Martyn*: or at least *Watts* had both an interest and a power, and then the deeds would operate more properly out of the interest than out of the power. At any rate, he did not mean that the assignees should take the estate without payment of the rent-charge; and unless it is clear that it was intended to operate out of the power, and not out of the interest, it will operate out of the latter. Now the first words of conveyance are *buy* and *sell*, which are applicable to a conveyance out of the interest, and not under the power. And the doctrine in *Parker v. Kett*;* and also in 2 *Brown's Chancery Cases*, 300; and in *Hobart*, 159; and also in Sir *Edward Clere's* case, is that where a person has an authority and an interest,† and he does an act, which will be good in both ways, it shall rather be referred to his interest than his authority, unless he particularly refers his act to his authority, and not to his interest. In *Cox v. Chamberlain*,‡ Lord *Alvanley* indeed seemed to doubt the doctrine of Lord *Kenyon*; that a power reserved to one who has the fee without an intermediate

* 12 Mod. 466. † 4 Ves. jun. 637.

‡ 6 Reports, 17.

estate is nugatory; but in the case of *Maundrell v. Maundrell*, the present Master of the Rolls, Sir W. Grant, decided upon it as a good authority.

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ABBOTT, *contrâ*. "The authorities do not bear out the conclusions drawn from them by the *plaintiff's* counsel; for on reading the terms of the deed, it is clear that no legal estate vested in *Watts* during his life. The power is therefore not nugatory. The case of *Goodill v. Brigham* was a case of a will, with a devise to one and her heirs for ever, but the devise to her, the testator said, should not be under the control of her husband; and all that the court decided was, that this being inconsistent with the devise of the fee, it would not enable her to dispose of the lands in any other way than according to the common law, by a fine, as a *feme-covert* usually does. In *Cox v. Chamberlain*, the Master of the Rolls says, that he does not take the court to have decided that a party *may not* convey out of a power of appointment, although he has *also* the *fee*, and so *supercede* the fee; one question there was, to say, whether this ought not to be considered as an appointment out of his *use*, and not out of his estate. Conveyances in this form are intended to operate in bar of dower; that was the object here. Afterwards indeed when the purchaser comes to sell again, he ought to convey only by appointment, and not to use words operating upon the legal estate. If, here, he had omitted the words *bargain and sell*, it would be impossible to contend that the conveyance operated out of the *legal* estate."

LAWRENCE, J. "Is it usual in these estates, in order to bar dower, to give an estate for life in default of appointment? Has that ever been held to bar dower?"

ABBOTT. "*Maundrell v. Maundrell* was a case of dower, and it was said that he could only convey sub-

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VOYSE
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ject to dower; but in that case the decree has been reversed."

LAWRENCE, J. "In that case was it held that it would be a good bar of *dower*?"

DAMPIER. "In that case there was a limitation before the marriage, to the use of the party for life."

ABBOTT. "That would be of no service, for the use to himself for life would merge in the fee to himself afterwards; though it would be otherwise if the estate were to another for life in trust for him. Unless, therefore, this deed must necessarily operate out of the estate, this court will not say that it *did*, and the award of the arbitrator ought not to be set aside."

DAMPIER, *in reply*, finding that the authority of the case of *Maundrell v. Maundrell* was reversed, and that of *Cox v. Chamberlain* was very strongly against him on the first point, relied chiefly on the second; namely, that *Watts* conveyed out of his estate, and not out of his power. In *Cox v. Chamberlain*, it was said that *Freeman* was no party to the estate; but here *Coates* the trustee was. Although the object of the parties might be to bar dower, yet there is a further intention that the parties, who have the rent-charge, shall be liable to pay rent, because there is a covenant to pay the rent which otherwise would be nugatory; and it could never be the intention of the parties to take an *estate* in the *rent charge*, and to look only to the person of the *heir*, and not to the *land* for the recovery of it. The covenant of indemnity was only to make the party liable, in case the original party should be called upon. When *Watts* took the estate in 1791, he had a power to be executed out of a use, and might, perhaps, thereby have barred dower; but when he conveys in 1792 to the purchaser of the rent-charge, he means to give him

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the benefit of the covenant to pay rent. Here the first operative words of the *conveyance* are such as take effect out of the estate, and the conveyance, by *lease* and *release*, is wholly nugatory if it is to operate as an appointment merely. It is therefore a conveyance wholly out of the interest."

LORD ELLENBOROUGH, C. J. "It is a conveyance with a sort of double aspect, and we are to consider which intention was the most predominant. This is now said to be a very common mode of barring dower; but if so, I am afraid that our decision will shake many an estate in dower."

LAWRENCE, J. "I should rather think that it was the intention of the parties to *convey* every thing; that it should operate either as a conveyance by lease and release or an appointment."

The court took some days to consider of the case; and on this day the JUDGMENT of the court was delivered to the following effect, by

LORD ELLENBOROUGH, C. J. after stating the case. "It was admitted that the conveyances of the 24th June, 1791, by *Watts*, vested in him the fee-simple, with a power of appointment; and although Mr. DAMPIER at first insisted that the power was wholly nugatory and merged in the estate in fee-simple, yet he afterwards abandoned that ground in his reply; and the only point was, whether the conveyance of September 26th, 1792, operated out of the *interest* which *Watts* had or, as an appointment by him under that deed? If that be so, it ought to appear very clearly from the deeds that the conveyance or the covenants therein could not take effect unless it operated as a conveyance out of the interest, and not by way of appointment, in order to induce the court to determine that

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where the trustee to uses in a conveyance releases to a purchaser, it shall not operate as an appointment. Had it been the intention of the parties that it should operate entirely out of the interest of *Watts*, it would have been unnecessary that *Coats* should join. But it is clear that something was to be taken by appointment, and indeed there is no intention that less than the whole should pass. The reason of using both words of conveyance and words of appointment, is obviously in order that it might prevent such objections to the title as might be made if the estate were wholly derived from *Watts*. As to the covenants, they do not militate against this construction. If indeed the conveyance operated so as to make *Wadham* the assignee of *Watts*, the covenant by *Wadham*, to pay the rent-charge, would have been the less necessary, because *Watts* would then have had some security that he should not be called upon to pay. But whether the conveyance operated in the one way or the other, these covenants were necessary. If it operated so as to charge *Wadham*, as assignee, *Wadham* covenanted for *Watts* to pay the rent, and indemnify him, he being still personally liable on his covenant to the plaintiff. And if *Wadham* was not personally liable to pay the rent to the plaintiff, then a covenant to pay the rent and indemnify *Watts* became the more necessary. Both these covenants therefore, and the words of release proceeded from the ordinary caution of the conveyancer, who, where a person has both a power and an estate, made him both appoint and convey, in order that if the appointment should be defective it should be a good conveyance of the estate. We think, therefore, that the award of Mr. *Puller* is right."

JUDGMENT for the DEFENDANT.

EGERTON against MATTHEWS and Another.

1803.

Feb. 13.

A sale note or memorandum on the sale of goods, is not required to be signed by both parties, but only by the parties to be charged therewith, under the 39 Car. II. c. 3, s. 17: Aliter of a promise to pay the debt of another, which comes under the 4th section of that statute.

THIS was an action of assumpsit for not accepting certain bales of cotton according to an agreement entered into with the plaintiff. At the trial before Lord ELLENBOROUGH, C. J. at Guildhall, the following agreement was proved. "We agree to give Mr. Egerton 19l. per cwt. for 30 bags of Smyrna cotton; usual allowance 3 per cent, as soon as our certificate is signed. Matthews and Turnbull, 20th Dec. 1803."—The SOLICITOR-GENERAL cited the case of *Wain v. Walters*,* and contended that this note should have been signed by both the parties according to the authority of that case. Upon this the plaintiff was nonsuited.

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versus
MATTHEWS,
et. al.

A rule being obtained to shew cause why this nonsuit should not be set aside, and a new trial had,

The SOLICITOR GENERAL shewed cause, and endeavoured shortly to bring the case within the same principles as that of *Wain v. Walters*;

But the COURT held, that this note being a memorandum for the sale of goods, did not come within the same section of the act of 39 Car. II. this deing under the 17th, which enacts that no contract for the sale of any goods shall be allowed to be good, except, *inter alia*, some note or memorandum, in writing, of the said bargain, be made, and signed by the parties to be

* 5 East, 10. 1 Smith's Reports, 44 Geo. III. 299.

1805.

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charged with such contract, or their agents thereunto lawfully authorised;" and they said, to require a concomitant note in writing to bind the other party, would be, in effect, to add other words to this clause of the statute, and to require that the note should be signed by *both parties*, and not merely by the *parties to be charged therewith*. The agreement, in *Wain v. Walters*, was an agreement to pay the debt of another, and came under the 4th clause of the statute, and in that case, a sale note, such as this is, was considered as distinguishable.

PARK and ESPINASSE for the *plaintiff*.

The RULE ABSOLUTE.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN EASTER TERM,.

In the 45th Year of George III.

GAIRE against GOODMAN.—May 16, 1805.

1805.

If a party lies by after an irregularity in the proceedings, and knowingly permits the other party to take a further step in the cause, before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself.

ERSKINE and RICHARDSON shewed cause against a rule to shew cause why an interlocutory judgment should not be set aside for irregularity. The irregularity which was admitted, was the signing judgment without demanding a plea after common bail was filed. The common bail was filed on the 7th of *February*, and the demand of plea was made on the 6th. The interlocutory judgment was signed on the 26th of *April*, on which day notice was given of executing a writ of inquiry for the 4th of *March*. The defendant did not make his motion to set aside this judgment till the 7th of *May*.

GAIRE
versus
GOODMAN.

GARROW and MARRYAT, *contra*.

The court held that this application was too late. It should have been made, as it might have been,

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GAINE,
versus
GOODMAN.

before the *plaintiff* had incurred the expense of executing his writ of inquiry.

LAWRENCE, J. said it was unnecessary to cite authorities to prove that a party lying by till his adversary incurred additional expense, is precluded from objecting to an irregularity, as much as if he take a step himself.

RULE DISCHARGED.

RUTHERFORD *against* MEIN and others.—May 30.

Special *capias*, omitting the christian names of two of the defendants, amended by inserting them, though nothing to amend by, upon payment of costs and the costs of the application.

RUTHERFORD
versus
MEIN. 2.

RICHARDSON shewed cause against a rule to shew cause why the special *capias* should not be amended, by inserting the christian names of two of the defendants. The affidavit of debt, and also the special *capias* on which *Mein* was arrested was against — *Mein*, Robert Mackey, and — Scott. The rule was obtained upon the authority of *Carr v. Shaw*.*

He now insisted that there was nothing to amend by, the proceedings having been radically defective. That this was not to amend, but to supply, and to do now what ought to have been done at the commencement of the action. And that this was distinguishable from *Carr v. Shaw*, because there the proceedings, as against the defendant *Shaw*, were right.

ESPINASSE *contra*.

BY THE COURT. "This amendment is not so strong as that in *Carr v. Shaw* for there the name used was wrong; here there is only a blank. Yet there the amendment was allowed without any thing *dehors* to amend by.

RULE ABSOLUTE on payment of costs, and of the costs of the application.

1805.

ANONYMOUS.—*Practice—demand of plea.—May 28.*

ANONYMOUS.

After plea in abatement (or other plea as it seems) irregularly filed, and which the plaintiff treats as a nullity, it is not necessary to demand a plea previous to the signing of judgment, as for want of a plea.

RULE to shew cause why the judgment should not be set aside for irregularity.

The *defendant*, as of a subsequent term to the declaration, had pleaded in *abatement*, without an imparlance; upon which the plaintiff signed judgment without demanding a plea.

LITLEDALE, for the *defendant*, contended that the judgment was irregular; for the plea in abatement was either a good plea or a mere nullity. And if, as in this case, the *plaintiff* treated it as a nullity, then the *defendant*, standing as without a plea, was entitled to have a demand of plea served, previously to the signing of judgment.

WOOD, *contra*. "The plea in abatement made the demand of a plea unnecessary, as in *Lockhart v. Mackreth*,"* and the cases there cited: and,

THE COURT being of that opinion,

THE RULE WAS DISCHARGED.

BUCKLEY against TWREDDIE.—May, 28.

A note to pay a prisoner his sixpences was written upon the same paper with an affidavit to verify the plaintiff's hand-writing thereto: held, that the affidavit not being duly entitled in the cause, al-

* 6 Term Rep. 621.

1805.

BUCKLEY
VERSUS
TWEEDIE.

though the note was so, could not be aided by reference, and could not be read; wherefore the prisoner was discharged.

THE defendant was brought up to be discharged under the Lord's act. The plaintiff's counsel tendered him a note to pay the prisoner his *sixpences*, in the usual form. This was written on the same piece of paper as the affidavit to verify the signature to the note, which is required to be so verified unless the plaintiff attends in court. The note was duly entitled in the cause, but there was either no title to the affidavit or it was wrongly entitled, and I think it was not entitled at all.

YATES, applied to the court to discharge the prisoner, and cited authorities to shew that all affidavits in a cause should be properly entitled, or they could not be read.

BOPINASSE, *contra*, contended that the affidavit might be considered to be entitled by reference to the note, to which it was annexed; but,

BY THE COURT. "This affidavit is necessary to verify the note, and detain the prisoner. This is clearly within the general rule that an affidavit made in a cause should be properly entitled, which this affidavit is not."

PRISONER DISCHARGED.

MORRIS against LITGOK.—May 2.

In assumpsit on the warranty of a horse, where the warranty was "sound in the eye, &c. except a slight snap which will be well in a few days; held that the exception was material, and should be stated in the declaration, although, if the exception had not been made, it might not have been an unsoundness under the general warranty."

1805.

MORRIS
versus
LITGON.

THIS was an action of *assumpsit*, upon the warranty of a horse, stating a warranty that the horse was sound wind, limb, and eyes. The cause was tried at the last assizes for *Salop* before LE BLANC, J. On the part of the *plaintiff* it was proved, that when it was sold, the *defendant* being asked whether it was sound, said "yes, it is sound, wind, limb, and eyes, *except a trifling snap on one eye which will be well in a few days.*" The price was 16 *guineas*. The horse turned out to be blind of one eye, and to have very little sight in the other. A farrier was called as a witness for the *plaintiff*, and was asked whether a horse that had a snap in one eye, which would be soon well was an unsound horse; to which he answered in the affirmative.

The learned *judge*, upon this evidence, *nonsuited* the *plaintiff*, upon the ground, that the exception of "the trifling snap which would be well in a few days" ought to be stated as a material part of the warranty, and, therefore, there was a variance between the contract stated, and that which was proved.

PEAKE for the *plaintiff*, now moved for a new trial upon the ground of a misdirection, and contended that as this snap was stated as a trifling disease of the eye, which would be soon well, it was not an unsoundness, and therefore strictly not matter of exception; for it could not be an unsoundness if it could be so soon well. That an unsoundness must mean something permanent; and, *ex vi termini*, *except* is an exclusion of something which would be comprehended in the former terms, whereas this disease would not of itself be provided against by the warranty of *soundness*.

Lord ELLENBOROUGH, C. J. "Is not an *illness* in

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the eye, *ex vi termini*, an unsoundness? At any rate the party who made the exception must have understood it to be an unsoundness.

A *snap* was explained to mean a slight blow, or rather an injury arising from a slight *blow*.

RULE to shew cause REFUSED.

WILLOUGHBY against WILKINS.—May 2.

Where the defendant had obtained his certificate under a commission of bankruptcy after plea pleaded, and then pleaded it *puis darrein continuance* but, in fact, two continuances had elapsed, and the plaintiff had gone to trial, without noticing the plea; the court permitted him to amend, pleading it *nunc pro tunc*, upon payment of the costs between the last continuance and the time of filing the plea. A plea *puis darrein continuance*, though not a plea in abatement, must be verified by affidavit both when pleaded at *nisi prius* and when pleaded in bank.

WILLOUGHBY
versus
WILKINS.

7.

THIS was a rule to shew cause why the plea filed in this cause *puis darrein continuance*, should not be set aside for irregularity, and taken off the roll, or why it should not be pleaded as of the day when it was actually put in and filed.

The facts appeared as follows: the declaration, on an award of money to be paid, was delivered on the 4th of May last; the defendant pleaded *payment* as to one breach on the award, and another plea as to the rest; on the 29th of May an order was served to abide by the plea, and then the plaintiff replied; taking issue on the plea of payment; on the 4th of June he delivered the paper book and gave notice of trial at the third sittings in Trinity term; on the 15th of June a *distringas juratorum* issued, and every step was taken necessary for going to trial, and, late in the evening of the Saturday, before the trial, which would be on the Mon-

day, notice was given of a *plea* filed, *puis darrein continuance*, viz, that the *defendant* obtained his certificate, which in point of fact was obtained on the 31st of *May*. The *affidavit* of the truth of the *plea* was sworn on the 14th day of *June*, and not earlier; the *defendant* being, at the time, at a distance from town serving as an officer in the militia. Owing to the great number of causes in the paper, this cause did not come on upon the 18th of *June*, but stood over. The *venire* was returnable in eight days of the *Holy Trinity*, and the motion was made on the ground that there was no such last continuance as the *plea* referred to, but that a previous continuance had elapsed, namely the *Morrow* of the *Holy Trinity*, on the 27th day of *May*, between the time of the certificate being obtained and the *plea* being filed, and it therefore was irregular; that in point of fact a continuance had happened on the third day of *June*, so that the allegation of the last continuance in the *plea* was false, and if it was stated according to the truth when the *plea* was filed, there would appear a contradiction in terms upon the face of the record.

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WILLOUGHBY
versus
WILKINS.

LITLEDALE, for the *defendant*, now shewed cause, and admitted that, after a continuance had elapsed, between the happening of the matter in the *plea* and the filing of the *plea*, it could not be pleaded *puis darrein continuance*; but he contended that, having been filed, it ought not to be taken off the roll nor the record altered.

LORD ELLENBOROUGH, C. J. "Is not a *plea* after the last continuance so entitled as to bear relation to the last continuance, and therefore does there not appear a manifest error and contradiction upon the record if a continuance has, in point of fact intervened.

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LITLEDALDE. "That is the case in all *pleas*, for the whole of the proceedings are made up as of the *first day* of the term, and there is often a manifest contradiction, and would have been here if this plea had been pleaded originally to the action without an imparlance, and the fact of the certificate being obtained had been stated to have happened as it did after the declaration filed."

LE BLANC, J. "You ought to have come between the *Morrow* and the *Octave* of the *Holy Trinity*, and stated this fact to have happened since the *Morrow* of the *Holy Trinity*, and then it would be clearly correct; but here you come 13 days after the *Octave* of the *Holy Trinity*, and state that the certificate was obtained since the last continuance; and the question is, whether the *defendant* is bound to entitle his plea as of the day when it is filed."

LITLEDALDE. "The only cases in which that strictness is required are, where justice cannot otherwise be done. But this is a plea to the merits in which too great strictness ought not to be required. It is very different from a *plea* in *abatement*, *Wilkes v. Lord Halifax*; and in point of fact this certificate being obtained before the *judgment*, but after the time for pleading had expired, and after the *plea* put in, the *defendant* could not take advantage of it, under the statute 5 Geo. II. c. 30. The certificate here was obtained on the 31st of *May*. On the *Monday* following, the *plaintiff* gave notice of trial, the certificate being on the *Saturday* before. By giving notice for the third sittings in term the *venire* is made returnable on the second return of the term, which is only three days after the certificate obtained, whereas if the *plaintiff* had given notice of

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trial for the *sittings* after the term it would have been on the third return of the term, which would have avoided the inconvenience that occurred in this case. In this action, which is by original, it may indeed be questioned whether the continuances can be from day to day; *Martyn v. Twynam*,* *Com. Dig. tit. Pleader, B.*"

MARRYAT, *contra* " Although the statute 4 and 5 *Anne*, c. which requires a plea in abatement to be verified by affidavit, does not apply to pleas *puis darrein continuance*, yet ever before that time the court required that they should be verified by affidavit. *Abbot v. Rugesly*.†

LAWRENCE, J. " Does that rule apply where it is a plea in bank, or only where it is pleaded at *nisi prius*? In *Buller's nisi prius*, this case in *Freeman* is cited, and he says, therefore it is in the breast of the judge, whether he will receive it; and there may be good reason for this; but when the *plea* is in bank, I do not see any reason why it should be verified; at least the same reason does not occur." Afterwards, upon its being suggested that it might have the effect of throwing the *plaintiff* over the term, his lordship said that " as the dispensing with an affidavit might lead to that inconvenience, it afforded a reason for requiring such affidavit."

Here LITTLEDALE cited the case of *Lozell v. Eastaff*,‡ which he had omitted before.

Lord ELLENBOROUGH, C. J. " unless this *defendant* has the means of pleading his certificate in this way, he is remediless, although it is a just and fair

* *Strange*, 492.

† *Freeman*. 252. T. 29 Car. II,

‡ 3 *Term Rep.* 554.

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VERSUS
WILKINS.

plea which is given him by statute; and if the application were to plead it *nunc pro tunc*, should we not give leave to plead it; the question therefore comes now merely to a question of costs. Therefore let this plea stand, as if it had been filed in due time, and let the plaintiff have the costs between that time and the time when it was filed; that is between the third day of June and the 16th of the same month."

LAWRENCE J. "The case of *Lovell v. Eastaff* goes a great way to shew that the whole of what has been done by the defendant is regular."

RULE DISCHARGED as above.

HENFREE the younger against BROMLEY, and others executors.—May 2.

An arbitrator under the general terms, empowered to make his award, so that the same be made and published on or before a certain day is functus officio, when he has once made his award, and cannot alter the same. But if he do alter it, the award is still good for the original sum awarded; for he is then a mere stranger to the award; and it is not like the alteration of a deed in a material part, by the party.

RULE to shew cause why the award made in this cause should not be set aside.

The plaintiff had in last term moved for an attachment against the defendant for the sum of 69l. 6s. 6d. which being opposed, was refused upon the special circumstances hereafter stated, as being more than could be recovered upon the award. It was then moved, on the other side, to set aside the award, upon those circumstances, which motion the court also refused; but upon the application of ERSKINE for the defendant, this rule was, on the last day of the term, agreed to be opened again; and it came on to be heard to day.

The arbitrator had made his award at first for 57l. only; but in the afternoon of the same day, at the suggestion of the attorney, he added a further sum for half the costs of the award, which it appeared reasonable that he should order to be so paid. He therefore struck the sum of 57l. through with his pen, leaving it perfectly legible, and inserted the larger sum of 63l. 6s. 6d.

1805.
HENRY
DENTON
BROMLEY.

GURNEY, for the *plaintiff*, shewed cause, and contended, that, at least, the award was good for the one sum or the other; but that the arbitrator having the whole of the day, namely the 7th of *January*, in which to make the award, it seemed rather as if he should have it in his breast to keep his decision open till the last moment of that day, and therefore that any alteration he should make, before the expiration of the day, or the final delivery of the award to the party, should be valid; as, for instance, in case he made a mistake in a matter of account, in the casting up of a sum, it would be competent to him to alter and correct it. And although it is true, he had sent word that the award was made and would be ready to be delivered to the parties upon the payment of 8l. 10s. for the costs, yet in fact it was not published by the arbitrator, nor attested by the subscribing witness till after the alteration was made. It was indeed signed, but at the utmost, the alteration afterwards could only make a new stamp necessary, but could not vitiate the award.

ERSKINE and POOLEY, *contra*. "The attorney and attesting witness, wrote to the party on the 7th of *January*; 'Mr. H.'s award is executed and lies at my office, ready to be delivered to the parties on the payment of 57l. and 8l. 10s. costs in equal moities; neither of the parts can be delivered till the whole is paid.' This is a publication of the award, which, as it is not necessary to be attested or made before witnesses, is

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then out of the arbitrator's hands, and cannot be altered. But on the other ground the award is wholly void on account of the obliteration, as in case of a deed, which if it is obliterated in a material part by the party is rendered void; *Piggott's case*.*

Lord ELLENBOROUGH, C. J. "As to the first question which is now made, this is not a mere alteration on account of a mistake in matter of calculation, but an alteration in a matter of discretion; a change of purpose in the arbitrator. Now, an arbitrator is only appointed for a special purpose, to make an award, and, when he has once executed his office, when he has made his award, his appointment is at an end; he is *functus officio*. An alteration after the award is made and published; as it is here, is therefore void. But at the same time, and for the same reason, the act which he has done by obliterating the award cannot vitiate it; for he is become as a mere stranger to it; he and the attorney were then similarly situated, in point of interest. If he had any interest, I should be grappled with the argument on the otherside, that he might alter the award; but as he has none, at the time when he does the act of obliteration, he is very differently situated from a party who obliterates a deed.

RULE DISCHARGED.

JACOB against BOWEN.—May 2.

The bail in B. R. are only liable jointly or severally to the amount of the sum sworn to in the affidavit to hold to bail, and the costs.

JACOB
VERSUS
BOWEN.

IN this case, of which it is unnecessary to detail the particulars, as the practice seems clear, it became a question whether the *bail* were liable beyond the sum sworn to in the affidavit to hold to bail.

THE SOLICITOR GENERAL contended, from the language of BULLER, J. in the case of *Dahl v. Johnson*,* where he states the practice of this court, and wishes the practice of the court of *Common Pleas* to be rendered conformable to it, that each of the bail was severally liable to the amount of the sum sworn to, and though each might discharge himself by paying that sum with the costs, yet both could not be discharged until the whole debt was paid, as far as twice the sum sworn to would satisfy, with the costs; but

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versus
BOWEN.

LAWRENCE, J. referred to the rule made *Easter, 5 Geo. II.*; and the proceedings against the bail were staid, they having paid the sum sworn to, 80*l.* with costs.

LAWES, *contra*, was not heard.

SEAL-OFFICE—Holidays.—May 3d.

No holiday at the seal-office on the first day of Easter Term, and no extra fee can be demanded. The remedy of the party is by motion.

LORD ELLENBOROUGH, C. J. “ at the sitting of the court, stated that he had received an *anonymous* application concerning a charge of an additional fee made at the seal-office, for opening the office on the first day of term, which was no holiday, and the practice had been reprobated by Lord *Kenyon*, but that he could not take means to redress the grievance now complained of, on an *anonymous* application, but that the party must apply by motion in court.

SEAL-OFFICE

* 1 *Bos.* and *Pul.* 205.

1806.

PEARSON
versus
CRALLAN.

PEARSON against CRALLAN.—May 3d.

Where it is necessary or more convenient for the indorsee to send notice, by other conveyance than the post, to the indorser or drawer of the non-payment of a bill of exchange, he is intitled to do so, and charge for the same; Semble, the jury will judge of the propriety of the charge and of the quantum.

RICHARDSON, for the *defendant*, moved for a rule to shew cause why the verdict obtained for the *plaintiff* in this cause should not be set aside, and a nonsuit entered.

The *cause* was tried at the last assizes for the county of York. The declaration was upon a bill of exchange for 30l. dated the third September, 1804, two months after date, by Messrs. Bradbury and Dixon of Manchester, on a house in London, which, after having been indorsed to several other persons, came to the hands of the *defendant*, who indorsed it to the *plaintiff*, who indorsed it over. On the 6th of November, it was presented in London, and being dishonoured, was returned, through the hands of several indorsers, to the *plaintiff*, who paid the amount with costs; and on the 16th Nov. it was brought to Manchester, and the *plaintiff* gave notice to the *defendant*, and demanded payment with the costs, being 30l. for the bill, and 2l. 12s. 9d. costs. He objected to the amount of the costs, and tendered 31l. 11s. 9d. The expence incurred was on account of a messenger employed in the giving of notice. The *defendant* objected that the holder of a bill was not entitled to give notice by a special messenger, but only by the ordinary course of the post. It was agreed that, if a special messenger should be allowed, it was not an unreasonable charge. The 31l. 11s. 9d. having been tendered and that fact pleaded, and this objection being made to the legality of the charge, the *defendant's* counsel contended that the *plaintiff* should be non-suited; but the learned judge overruled the objection, and express-

ly left it to the jury to say, whether the sending by a special messenger was done wantonly or not; and it appeared that the letter, possibly, would not have reached the *defendant* for a fortnight, as he lived out of the usual course of the post; and upon this, the jury found a verdict for the *plaintiff* for the amount of the bill, and the full charge for the expences.

1804.
PEARSON
versus
CHALLOW.

LAWRENCE, J. " In some parts of *Yorkshire*, as it appears in this case, where the manufacturers live at a distance from the post towns, the letters may lie a long time before they are called for, and it may be necessary to send notice by a special messenger."

Lord ELLENBOROUGH, C. J. " It was rightly left to the jury, if it was left to them to say whether the special messenger was necessary, and also whether the charge was reasonable."

RULE NISI REFUSED.

PRICKMORE *against* BRADLEY.—May 3d.

On a bill of *Middlesex* returnable early in Michaelmas term, the defendant filed common bail after the *Esseign-day* of Hilary term, but before the first day of Hilary term; held that he might sign judgment of non pros, though he did not give notice of filing common bail.

MARRYAT moved for a rule to shew cause why the non pros signed in this cause should not be set aside for irregularity.

PRICKMORE
versus
BRADLEY.

The process by bill of *Middlesex* was returnable the first return of Michaelmas term, 1804; and the appearance of the *defendant* by filing common bail, he said, should have been within eight days, or if the *defendant* appeared afterwards he should give notice to the *plaintiff*;

1805.

**PRISONERS
VERSUS
BRADLEY.**

for by stat. 13 Car. II. c. 2, s. 3,* the appearance of the *defendant* should be in the term in which the process was returnable; but the appearance here was not filed until *January 22d*, 1805, which was after the *Essoign-day* of the next term, *Hilary*, 1805. He therefore contended that as the *defendant* had not appeared regularly himself, he could not sign judgment of *non pros*; or that he could not do it without having given notice of his appearance. And he cited *Impey's Practice*, 509, *Edit. 6*, title *non pros*, to shew that where common bail is not duly filed, as in the case of a prisoner who is supersedeable for want of a declaration, the *defendant* cannot sign judgment of *non pros*.

Lord ELLENBOROUGH, C. J. "Till the 23d of *January*, the master says that it may, for this purpose, be considered as exclusive of *Hilary* term; and upon filing common bail they never do give notice to the *plaintiff*."

RULE NISI REFUSED.

The KING against REYNELL, Clerk.—*May 3d*.

The court refused a new trial in an indictment for a misdemeanor for not repairing a wall, though moved on the ground of a misdirection by the judge.

* "Upon an appearance entered for the *defendant* by attorney, of the term wherein the process is returnable, unless the *plaintiff* shall put into the court from whence the process issued, his bill or declaration against the *defendant*, in some personal action or ejectment of farm, beyond the end of the term next following after appearance, a nonsuit, for want of a declaration, may be entered against him, and the *defendant* shall have judgment to recover costs against the *plaintiff*, to be taxed and levied in like manner as upon the 23 Hen. VIII. c. 15." 13 Car. II. c. 2, s. 3.

THIS was an *indictment* against the *defendant* as rec-
tot of *Horn-church*, for not repairing a wall con-
tiguous to the road; by the direction of the learned
judge before whom the case was tried, the *defendant*
was acquitted.

1803.
The King
versus
REYNELL.

MARRYAT moved for a new trial, admitting that
there were no modern authorities in such cases where
the *defendant* was acquitted.

Lord ELLENBOROUGH, C.J. and LAWRENCE, J. "Can
you not indict *de novo*? As it is a novel application
we will not make a precedent in a case of minor im-
portance.

RULE NISI REFUSED.

DOE on the demise of LINTOT against FORD.—May 3d.

*Where a lessor of the plaintiff dies, after nonsuit in ejectment, the
court will not grant a distringas upon his goods for a contempt in
the executor in not obeying the order upon the consent, rule to pay
costs; and the case not being within the stat 17 Car. II. c. 8, the
defendant seems without remedy for his costs.*

PARK, for the *defendant*, applied for a rule to shew
cause why a *distringas* should not issue against the
goods of *Lintot* in the hands of his executor, in order to
compel payment of the costs to the *defendant*, which he
admitted was a novel application.

Doe dem.
Lintot
versus
Ford.

Ejectment was brought against the casual ejector;
Ford and others were admitted to defend upon the
usual terms, and a part of the order for that purpose was
as follows; "and it is further ordered, that if, upon the
trial of the said issue, a verdict should be given for the
said *defendant*, or it shall happen that the *plaintiff*
shall not further prevent his said bill for any other
cause than for not confessing lease, entry, and ouster,

1808.
 ———
 Dea dem.
 Lessor
 versus
 FOND.

then the lessor of the *plaintiff* shall pay his costs to the said *defendant* in that behalf, &c." At the summer assizes for Sussex, the cause went down for trial; but not coming on, there was a nonsuit; an application was made to the executor for the costs; and judgment was entered within two terms. The case did not fall within the letter of the stat. 17 Car. II. c. 8, and 8. and 9 W. III. c. 11, which applies to cases of verdict only, and not to cases of nonsuit; the words being in the former statute, "the death of either party between the verdict and the judgment, shall not be alleged for error, so as such judgment be entered within two terms after the verdict;" and the latter statute applying only to case of interlocutory judgment. But as *Lintot*, if living, would have been liable to an attachment for not paying the costs, he contended that his executor should now be made to pay by means of a *distringas* upon the goods of the testator, as for a contempt, and unless this rule was granted, he said the parties were deprived of all possible remedy.

Lord ELLENBOROUGH, C. J. "I do not see any pretence for taking the goods by *distringas* for the personal contempt of the party who is now dead."

RULE NISI REFUSED.

Ex parte HARRISON.—May 14.

To compel obedience to a writ of Habeas Corpus to bring up an impressed man, the party must first search at the crown-office for the return, and if not found, apply, upon affidavit thereof, for an attachment.

Ex-parte.
 HARRISON.

SMITH moved for an *attachment* against the captain of a man of war, for not obeying a writ of *habeas corpus*, directing him to bring up the body of an impressed man. The affidavit stated that, when the writ was tendered to him, he refused to accept it, and the

party left it on the table ; but it did not state whether the captain had returned the writ or not.

1805.

Ex parte
HARRISON.

THE COURT, at first, suggested that, as no case of actual contempt of process appeared, the captain should be ruled to return the writ ; but on further investigation, the practice appeared to be that the party should search the *crown-office* for a return to the writ ; and, if no return appeared to be filed, then he should apply for an attachment upon affidavit of that fact.

COCKS against HARMAN.—May 20.

The court refused to grant a rule upon an attorney to deliver up papers, where he was employed as a mere agent and receiver, and not as attorney in a cause, and where the court would have had no power to have granted a mandamus against him to deliver up papers had he not been an attorney. The power of the court over its officers does not extend to make it a substitution for a court of equity, by proceeding against them by motion.

DAMPIER moved for a rule to shew cause, why Mr.

C. Harman, an attorney of the court, should not deliver to Mr. *J. Cocks*, as the heir at law and the only acting executor of *James Cocks, Esq.* his late father, deceased, an account of his receipts and payments in respect of the estate, in the affidavit mentioned, and why he should not deliver up, on oath, all such deeds, papers, and writings as are now in his custody or power, relating to the said estate, together with the power of attorney given to him by the said *J. Cocks*, deceased, and why it should not be referred to the master to take an account, and why the said *C. Harman* should not pay the balance over to the said *J Cocks*.

COCKS
versus
HARMAN.

1803:

Cocks
versus
HARMAN.

He stated that it did not appear that *Harman* was employed as attorney in any cause, but only as agent and receiver for *Cocks*, deceased.

Mr. *Short*, the clerk of the rules, as *amicus curiæ*, mentioned a rule that had been obtained of a similar nature against an attorney in a cause. And *Hughes v. Mayre** was also cited.

BY THE COURT. "In that case there was something to be done for which the court could grant a *mandamus*, namely, the giving up of *court-rolls*, and he being an attorney of the court, they rather preferred a motion against him as an officer of the court; which was only substituting one sort of *festinum remedium* which the court might grant, in the place of another. But here the court cannot do what is asked, by *mandamus*; and the application is to put this court in the place of a court of equity. If these rules were allowed, it would go to make this court a court of equity in all cases in which an attorney might be made a defendant in equity.

RULE NISI REFUSED.

COWELL and Wife against WATTS.—May 28.

A count for goods sold by A. as administrator of B. may be joined with an insinual computassit, between B. and A. as administrator, whether the sale or account be in the personal or representative character; for both being stated as considerations accruing, and promises made between the same parties, the costs in each case would go to the same fund, whether to the intestate's estate, or that of the administrator: and the reason why counts on promises made to the intestate cannot be joined with counts on promises to the executor, is, because the costs are entire, and cannot be severed.

* 3 Term Rep. 275.

ASSUMPSIT by the *plaintiff*, and *Jane*, his wife, administratrix of ——. The first count stated, that the *defendant* was indebted to the said *Jane*, as administratrix aforesaid, for a moiety of divers goods, wares, and merchandizes by the said *plaintiff* and *Jane*, as administratrix aforesaid, before that time sold and delivered to the said *defendant* at his special instance and request; and being so indebted, the *defendant* undertook, and to the said *plaintiff* and *Jane*, administratrix as aforesaid, promised to pay 50l. &c. There was a second count upon a *quantum valebant*, in the like form. Third count, that afterwards and after the death of the intestate, to wit, on, &c. at, &c. the *defendant* accounted with the said *plaintiff* and *Jane*, as such administratrix as aforesaid, of and concerning divers sums of money before that time due and owing from the said *defendant* to the said *plaintiff* and *Jane*, as such administratrix as aforesaid, and being then in arrear and unpaid, and upon that account the said *defendant* was found to be in arrear to the said *plaintiff* and *Jane*, as such administratrix as aforesaid, in 50l. and being so found in arrear and indebted, the said *defendant* undertook, and to the said *plaintiff* and *Jane*, as such administratrix as aforesaid, faithfully promised to pay, &c.

1805.

COWELL
and Wife
versus
WATTS.

The cause was tried before Lord ELLENBOROUGH, C. J. at the sittings, after Hilary term, at Westminster, and there was a verdict for the *plaintiff*. A rule was now obtained to shew cause why the judgment should not be arrested on the ground of a misjoinder of action.

GARROW and MARRYAT, for the *plaintiffs*, now shewed cause. The words in the first count, "sold by her the said *Jane*, as administratrix," must mean something different from a sale by her on her own right; as for

1808,

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and Wife
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WATTS.

instance, a sale of goods, to which she became entitled as administratrix, and which she sold for the purpose of discharging the *debts* of the intestate, and the produce of which would be assets in her hands. In *Petrie v. Hannay*,* which was an action for money paid by the *plaintiff* as executor, and also for money paid by the testator, with other counts for money had and received, for the use of the testator, there was a writ of error in the house of lords, and then an application to amend, and it was said that this was not error; for, though an executor cannot join a debt due in his own right, yet it is the constant practice to join money had and received to the use of the testator, with a like count for money had and received to the use of the executor, as such. Now here, although it is said the *plaintiff*, Jane, might have sued for this in her own right, and, therefore, ought to have paid costs, if she failed, yet that is no objection to her declaring in this form. As to the account stated, although it is not of money due to the intestate in his life-time, yet it is still an account in her representative capacity, for it may be an account made of those very goods which were sold by them to him in their representative capacity, and the produce of which would be assets; or the *defendant* might have been employed to collect and receive monies, the effects of the intestate, and this being *assets*, she may sue for the amount as administratrix; although as she might sue in her own right, she might also on this count be liable for costs if she had failed.

The SOLICITOR GENERAL and WOOD, *contra*.
“On the first count, the *plaintiffs* ought to sue in their own right, and not in a representative capacity; in the second count, they ought to sue in their representative capacity; and therefore these two counts cannot be joined. Where an administratrix sells goods that come to her hands in her

representative capacity, the contract between her and the buyer is wholly independent of the nature of her interest and title. The demand arising from the sale results to her personally. Upon such a sale of goods, as her being administratrix, would not alter the nature of the contract, the words "*as administratrix*" must be rejected as surplusage. And then, also, it cannot come into an account for money due to the *plaintiff*, *Jane*, as administratrix; but the *defendant* may set off against it money due from her in her own right. In *Petrie v. Hannay*, the count might be good, because the *plaintiff* might be compelled to pay money for the *defendant* as executor; as for instance, on a joint indemnity-bond, entered into by the testator and the *defendant*, upon which the *plaintiff* could only sue as executor; but, here the sale of goods, after the death of the intestate can only be in the personal capacity of the administratrix."

1805.

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and Wife
VERSUS
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Lord ELLENBOROUGH, C. J. "All of these counts are laid, as it were, in privity of promise; and on one of them, if I may use the expression, there is this difference, that it depends more upon the privity of consideration; but they all state an immediate promise between these parties. Then, with this similarity, is there any case to say, that, when there is a community in privity of promise, they cannot be joined? In the other point of view, and taking it that the promise upon a consideration of goods sold must result to the parties in their private capacity; the words "*as administratrix*" may, as the *Solicitor General* says, be rejected as surplusage. I wish that the case in 2 *Lev.* 165, and the reasons which influenced the court there, had been still adhered to; namely, that *assumpsit* for an account stated with the testator might be joined with a count on an account stated with the executor, for monies due to the testator; because the money, when received, would be

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and Wife
versus
WATTS.

assets; and the same opinion was maintained in another case, *Mason v. Jefferies*, 3 Lev. 60; and another later case, *King v. Thom*, * adopts the same principle. That was an action on a promissory note indorsed by the plaintiff as executor; and that was, on the same authority, held well maintainable, where it was joined with other counts by the plaintiff as executor, and I think that goes upon the right principle. The true reason why counts in different rights cannot be joined is to be found in the case of *Rogers v. Cook*, 1 Salkeld, 10; and also reported in *Carthew*, 325, and *Shower*, 366; but there the point is not so fully stated as in *Salkeld*. That was an action as administrator of A. against B. for a debt due to A., in which the plaintiff had joined a count for a debt to himself, and it was held ill; 'for the plaintiff cannot prosecute his own right and another's: and the reason is, because the costs to be recovered are entire, and then the plaintiff can never distinguish how much he is to have as administrator, and how much he is to hold in his own right.' But where the costs on both counts belong to the same fund; where either they are to be paid into the representative fund, or to come out of it, the reason applies that such counts may be joined. So in *Hooker v. Quilter*, 1 Wils. 172, the same case is cited, and the same principle is adopted; though there is a difference as to the fact whether the case came on upon a demurrer. It would, I think, also have been the more convenient rule, to have said that, where there is one fund out of which the costs must be paid, and the promise was to the plaintiff in the character of executor, there might be a joinder of action. This case is not at variance with that principle. In the character of administratrix, indeed, the plaintiff, *Jane*, cannot be considered as having sold the goods; but the pro-

* Term Rep. 487. See also *Betts (executor) v. Mitchell*, 10 Mod. 315.

mise is stated to the *plaintiffs* after the death of the intestate, as made to them in their personal capacity in each instance, and all arising out of an act of sale of the goods of the intestate after his death. In each instance, the special promise is stated to be made with the administratrix; and, then in each of the three instances, it may be made to her in her same character, to her personally. The words 'as administratrix' relate to the consideration, which indeed relates to the intestate. Both the counts may perhaps relate to some common consideration, inducing a promise, as the sale of goods of the intestate, and in fact the promise made to her as administratrix may be joined without clashing with any rule of law. As to the question, whether, as *administratrix*, she is to pay costs, that could arise only on a question of costs, in case the *plaintiff* had failed, and is foreign to this case."

GROSE, J. "How can it be said that a husband and wife can recover as administratrix in either case? The counts are similar as to the character in which the parties sue. The husband recovers here, in right of his wife, as *administratrix*; and if they receive the money, it will be *assets*."

LAWRENCE, J. "I am of the same opinion. The reason why counts on promises made to one personally cannot be joined with counts on promises made to the testator, where the sum recovered is to be applied in aid of the fund of the testator, is, in some cases, because the costs are entire, and in other cases, because the damages are entire. But that reason does not hold in this case. Where the party recovers an entire sum for costs or damages, and one cannot say what he is to recover in his own right, and what in that of another: one can easily see the reason why the counts cannot be joined; and the cases cited have a great deal of good sense in them, and are very good authority. It is a very different question

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what would be the effect of the case; as to the question of costs, if they had declared in their representative capacity, when they might have proceeded in their personal character. But the reason, as to the payment of costs, is very clear. When the parties declare in their representative characters, it is supposed that they cannot be sufficiently cognizant of the contract, whether it is justly founded or not, so as that they should be made to pay the costs: but if, on the contrary, the contract, though made in a representative character, is made by the executor or administrator himself, then he may know whether there is any ground to sue or not; and that may be a very good reason why, in declaring upon such a contract, he should pay costs. But the reason on which the rule as to the joinder of actions is founded, namely, the entirety of the costs, does not apply to this case, where both counts are upon contracts made personally with the administratrix, whether as administratrix or not; and particularly when whatever is to be recovered is to go into the funds of the intestate."

LE BLANC, J. "There clearly can be no misjoinder when the whole will belong to the parties in their representative character upon both counts. Now these are both in the same right; for I cannot see but that the last count may be for an account on the very same sale as is stated in the other counts. Now, suppose a bargain in writing, that upon the purchase of the goods of the intestate, upon a sale by auction of the goods of the intestate, he, the *defendant*, undertook to pay such a sum to them as administrators, and afterwards he had accounted with them, would not the first count be supported by such a writing? This is a plain and clear rule, that where the transaction has been entirely with them in their representative character, and not in their personal character, or all in their personal character, the counts may be joined."

RULE DISCHARGED.

The KING against JOHN COGGAN, Esq.—May 25.

1803.

A mandamus may be granted to admit to a copyhold estate the person who appears to have the legal estate, without regard to his equity.

T. W. WILLIAMS, Esq. applied early in this term for a mandamus to compel the lord and steward of the manor of *Laleham*, to hold a court and admit him tenant to thirty acres of customary land, upon payment of such reasonable fine as should appear to be due.

The KING
v. COGGAN.

PARK and MARRYAT, on shewing cause against the rule, cited the *King v. Hendon*,* and the case of *Williams v. Lord Lonsdale*, in 8 *Vezey, jun.* and urged that he had no right to be admitted. The premises were devised by one Mrs. B. who died in 1779, to T. W. Williams, his heirs, executors, &c. upon trust for the heirs and assigns of Jane Noble. Mrs. Noble, after intermarrying with one Malpass, died in 1782, without any heir. Williams, the trustee, died in 1783, without admission, leaving the applicant, an infant, his heir at law. He shewed no interest, except as trustee, and to obtain a reimbursement of monies laid out, after an intermediate limitation to Walter Williams, the father of the present.

LAWRENCE, J. "It is determined that if an estate is devised to a man and his heirs in trust for one and his heirs, and the heir of the *cestui que trust* die without heirs, the estate does not escheat to the crown, but goes to the trustee; so that if there is no heir it does not go to the lord."

The SOLICITOR-GENERAL, was for the applicant.

The COURT made the rule absolute, after examining the case in *Vezey, jun.* which they said proceeded

* 2 Term Rep. 484.

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upon the ground that there was no equity in the party claiming to be admitted ; but that, as in this case it appeared that the trustee had the legal estate, that was sufficient to induce a court of law to grant the *mandamus*. And upon a reason urged against the *mandamus*, that the title of the *copyholder* was good against all but the *lord*, without admission, they observed that the *copyholder* may require admission for the purpose of being enabled to make a surrender. The rule for the *mandamus* was therefore made absolute, the party undertaking to pay such reasonable *fine* or *finer* as should be due to the lord upon the admission, the father of Mr. Williams not having been admitted. This was made a condition by the discretionary power of the court, though in strictness no fine is due until admittance ; and they observed, that if an exorbitant *fine* should be demanded, that question would come on, upon the return to the *mandamus*.

RULE ABSOLUTE.

THE KING *against* NIELD and Others.—May 22.

A conviction on the 39 and 40 Geo. III. c. 106, *for entering into an agreement to controul a master manufacturer, held bad, because it neither stated the words and terms of the agreement, nor pursued strictly the words of the act ; but was stated as an agreement for the purpose of controuling* A. B. &c.

THE KING
versus
NIELD.

THIS was a motion to quash a conviction as follows:
“ Be it remembered, the *defendant*, John Nield, and seven others (naming them), are convicted before John Leaf and R. A. F. two of his majesty's justices of the peace for the county of Lancaster, of having, on the 1st day of November, at Chalton-row aforesaid, in the county aforesaid, each and every of them being a workman in the manufacture of cotton, been unlawfully concerned in the making of and entering into a certain agreement, *for the purpose of* then and there controuling W. Borodale, J. A., &c. then and there car-

rying on the manufacture and trade of cotton spinning, as masters and partners, in the conduct and management of their said trade and manufacture, the said agreement not being a contract made between any master and journeyman or manufacturer, for or on account of the work or service of such journeyman or manufacturer; contrary to the form of the statute made in the 39th and 40th years of the reign of his present majesty, entitled; 'an act to amend an act passed in the 39th year of the reign of his present majesty to prevent unlawful combinations of workmen, and to substitute other provisions in lieu thereof; and we do hereby adjudge the said *John Nield*, &c. for the said offence to be committed to and confined in the common goal for the said county for the space of three calendar months." This conviction, upon appeal to the sessions, was confirmed.

1803.
The King
versus
NIELD.

SCARLET, in support of this conviction, contended that it was not necessary to state the terms of the agreement in this case, though in cases of conspiracy it may generally be necessary. For there is not only a form set out in the act, but also it may be useless altogether to state the agreement; for in terms it may be an agreement which could import nothing of the purpose charged, and then the party must still go into evidence of the real nature of it in order to shew that it has the tendency which is imputed to it: and the only true use of setting out an agreement in terms, must be in order to shew that the tendency and wicked effect imputed to it are such as it necessarily bears. He cited a case of the *King v. Mosely and Moore*, which was an indictment on the statute 37 Geo. III. c. 123, which made it felony to administer oaths, purporting to bind a person to engage in any mutinous or seditious purposes. There was a count, stating the oath which was

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worded in such a manner as to appear to be only to bind the parties to an assembly for a religious purpose; and there were other counts omitting the oath altogether, upon which the *defendant* was found guilty. The same objection was taken to the indictment, that the oath should be set out, and the case was referred to the twelve judges; no opinion was delivered formally, but it was held that it was not necessary to state the oath; and that the doctrine, as to the setting forth of false pretences and tokens used, could not apply to cases where the intent of the parties was the ground of the offence, and where the stating the oath itself would be no aid in ascertaining that intention. This is an indictment for entering into a combination to controul a master, and a case of an agreement may be put in which the words may be set forth, and it would yet require evidence to shew that it was with a purpose to controul the master in his trade. The conviction now states the effect of the agreement in point of law, which is further to be made out in evidence; and the form of conviction in the statute requires that the offence should be set forth, and not the evidence of the offence. The cases of a forged bill of exchange, of a threatening letter, and others of that kind are very different."

ERSKINE, *contra*. "In all these cases it is of great importance that the substance of the offence should be stated; and though it is easily possible to conceive a case in which the agreement might not of itself import any thing criminal, yet that is not a sufficient ground for rejecting it as unnecessary to be stated.—A threatening letter may be couched in ambiguous terms, as "if you will not do what I told you yesterday, I will do what I told you yesterday;" yet it would be necessary to set out such a letter. And Lord Kenyon, in the *King v. Jackson and Others*,* said, that it was al-

* 8 Term Rep. 542.

ways of importance that the justices should state the offence in their convictions, in order that the court might see whether the *defendant* was lawfully convicted or not; and he lamented that the justices, in that case, did not pursue the words of the act. There the only difference was between the effect of the word *fraudulently* and the word *knowingly*, which the court held were not equivalent in that case. In *Lloyd's case*,* which was an indictment for sending a threatening letter, it was held that the letter must be set out; so also on the statute 30 Geo. II. c. 24, against obtaining money on false pretences, the pretence must be set out. *The King v. Marson.*†

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SCARLET. "in reply, put the case of an agreement, in writing to meet at a club twenty miles off, at a certain time, which would be at the time of work; this would not import any thing injurious to the master, and yet would be an agreement to controul the master, and in its effect might operate to his injury, against the provisions of the act."

LORD ELLENBOROUGH, C. J. "If the purpose of such an agreement was to controul the master, the court would incorporate the subsequent act with the agreement, and it would by evidence appear to be an agreement for controuling the master, and would be brought within the act; and if it was so stated we should understand that it was proved in evidence to be for controuling the master, and made with that intention. In the case of the *King v. Moore and Moseley* the words were, 'for the purpose,' and then it would be enough to state it in those words. But here the entering into the agreement for the purpose of controuling the master would not be true, unless the agreement on the

* *East's P. C.* 2, 1122,

† 2 *Term Rep.* 581.

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face of it has that intent. I do not know that where there is an agreement on paper and in writing, accompanying an unlawful act, but it must be set out, except in cases of high treason. There though writing letters is an overt-act, yet they are not set out, because the letters themselves are only decisive evidence of an overt-act; but in all other cases where the agreement is in writing, it must be set out. But here the conviction, though it pursues the form of the conviction in the statute, in part, does not pursue the words of the act, in which case it might have been right. The words in the conviction are, "for the purpose of" the words in the act are, "agreements for controlling or any way affecting any person or persons, &c."

GROSE, J. and LAWRENCE, J. concurred in opinion that the conviction was defective.

LE BLANC, J. said he believed that it entered a great deal into the consideration of the court in the *King v. Moore and Moseley*, that there was a clause in the act which made it not necessary to state the form of the oath, but said that it should be sufficient to set forth the purport thereof. The objection here is, that it does not state that from which the court can judge whether it is within the act of parliament.

The case stood over for the court to examine into the case of *the King v. Moore Moseley*, and Lord ELLENBOROUGH, C. J. said, upon examining that case, it did not appear to govern this.*

CONVICTION QUASHED.

* In the statute 37 Geo. III. c. 123, upon which that indictment was founded, there is the following clause, s. 4
 "It shall not be necessary in any indictment against any person administering, &c. such oath as aforesaid, &c. to set forth the words of such oath or engagement; and it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof."

KENNETT against DUFF.—May 22.

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Where a bankrupt brought trespass against the messenger to the commission, in which action he was non-suited, without the validity of the commission being fully tried, and afterwards brought trover against the assignees to try the same question: held, that he should not be put to give security for costs. Semble, aliter, if the question had been once fully tried.

THE plaintiff had been a bankrupt, and a commission was sued out against him; to try the validity of which, he brought an action of trespass in the court of Common Pleas, against the messenger for taking certain goods; and upon that trial deeds were produced by the plaintiff himself, in which it appeared there was a clause of assignment of the property to his son, and he was non suited. The costs were taxed at £54l. but not paid; and before the payment of those costs, he brought the present action in trover against the assignee under the commission, to recover those very deeds.

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The defendant obtained a rule to shew cause why the proceedings should not be staid in the present action until security should be given for payment of the costs of the former action; this being an action for the purpose of trying the same question, although it was not against the same defendant; and the cases of *Webb v. Ward*,* and *M'Donnell v. Barnett*,† &c. were cited.

ERSKINE and MARRYAT shewed cause.

GARROW and GURNEY contra.

Lord ELLENBOROUGH, C. J. "It appears that on the former trial the plaintiff was turned round upon rather a formal objection, which was in some measure

* 7 Term Rep. 296.

† 1 East, 432.

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a delay created by the parties to the commission. If the question had been once fairly tried, it would not be fit to let the *defendant* proceed by making experiments to try the case over again, without paying the costs, which, however, he is still liable to pay. If we stopped him now, he would be prevented from trying a very material question, in which his interest is greatly concerned. The rules laid down in cases of *ejectment* where there has been a trial, or in the cases cited, do not either of them apply.

RULE DISCHARGED.

The KING against RUSSELL.—May 22.

Semble, A stoppage in the streets for the purpose of unloading waggons at an inn or warehouse, may, by its frequency, become a nuisance, and the party be obliged to remove his business to a more convenient place for the public.

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THIS was an indictment against the *defendant* for a nuisance, in blocking up the highway in a certain street in *Exeter*, with divers waggons; upon which the *defendant* having been found guilty, he was now brought up for the *judgment* of the court. The prosecution was at the instance of the corporation of the city of *Exeter*. The *defendant* was a carrier of great eminence, whose business was very extensive, and in the course of it, when a number of waggons arrived at the same time, from different places, so that it was inconvenient to unload them in his own yard, he placed them in the public street while they were unloaded; and it was for the stoppage and inconvenience occasioned in the street by this means, that the indictment was preferred, and for which the *defendant* was found guilty.

THE *Solicitor General*, *Praed*, *Serj.* and *Dampier*, stated, on the part of the *defendant*, that he offered to agree with the corporation of *Exeter* never to detain

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his waggons in the street, for the purpose of unloading longer than is absolutely necessary. And since the verdict on the indictment was found, he had only seven waggons at several different times in the street, during the course of nine weeks; and he thought he had a right to unload his waggons in the street, when his yard was so full that he could not take them into it. The corporation of *Exeter* wished him to engage never to unload even a single waggon in the street; this he refused to agree to; but he offered to agree never to have more than one waggon in the street at a time, and that only when, from the great pressure of business, and from the unexpected arrival of waggons, it should become necessary. If this was agreed to, the *defendant* offered to enter into a rule of court, binding him to the performance of it.

LENS, Serj. and EAST, *contrâ*.

LORD ELLENBOROUGH, C. J. *the other judges assenting*, "If the *defendant* thinks he has a right to unload his waggons in the street for the purpose of delivering the goods out to his customers, he is clearly wrong. With respect to his unloading them into the warehouse, even that right must be understood with a limitation. The highway must be kept free, for the convenience of passing through it; but yet, as all persons are not obliged to go from end to end of the highway, but it may be necessary for the purposes of business to stop in a particular place, it must follow, that he has a right to do so with a reasonable limitation. And, if his business becomes of such a nature from the extent of it, that it cannot be carried on there without greatly impeding the passengers, then it will be a question, whether the trade itself is not a nuisance which ought to be removed to another place. We cannot enter into any arrangement of compromise; we can only state a general principle of law by which the *defendant* will

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be bound, and it will be a question upon another indictment what stoppage will be a nuisance." The *defendant* entered into his own recognizance to appear next *Michaelmas* term.

ANSTRY *against* MARDEN, in the court of COMMON PLEAS, *Michaelmas* term, 1804,—November 22d.

A docket being struck against A. one B. agreed with C. and several of the creditors by parol to pay 10s. in the pound out of his own moneys, they assigning the debts to him; and a deed to that purpose was agreed to be made, and C. authorized D. by parol, to sign it for him; the rest of the creditors signed; C. afterwards refused, and brought assumpsit against A. for his whole debt, who pleaded the general issue, and accord, and tender of satisfaction, as above; and a verdict was obtained for the defendant; B. moving that it should stand, the court refused to set aside this verdict, though on all the special pleas C. was entitled to a verdict. Held, that this, being a purchase of the debts, was not within the statute of frauds, and C. could not recover in his own right, but only for B.

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THE *plaintiff* declared against the *defendant* in assumpsit, on a contract to replace certain stock in the *Loyalty* loan, with other common counts.

The *defendant* pleaded several pleas, 1st, *non assumpsit*; 2dly, as to all but 525l., that he was indebted to the *plaintiff*, 576l. 2s. 6d.; and that, being unable to pay, the *plaintiff* and others agreed with the *defendant* and one *Tho. Weston* that the said *Weston*, by the procurement of the *defendant*, and at the request of the *plaintiff*, should pay out of his own proper monies to the said *plaintiff* and other creditors of the *defendant*, a sum equivalent to 10s. in the pound, on the amount of their respective debts, in full satisfaction and discharge thereof, which they the said *plaintiff*, &c. would receive in full satisfaction, &c. and averred mutual promises to perform the said agreement, and that the said *T. Weston* afterwards and before the commencement of the suit, to wit, on, &c. at, &c. tendered to

and offered to pay out of his own proper monies for and on behalf of the *defendant* to the *plaintiff* the sum of 525l. being a composition, &c. and which said sum of money the said *plaintiff* then and there refused to accept; and averred that *Weston* had always been and still was ready to pay, &c. and concluded with a verification and a *proferri in curiam* of the 525l. and prayed judgment *si actionem ultra* 525l. &c. 3dly, A like plea of a like agreement between the *plaintiff*, the *defendant*, and *T. Weston*; 4thly, a like plea with a little variation in the form of the agreement.

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The *plaintiff* replied, and took issue on the *non assumpsit*; and as to the special pleas, separately protesting that they were insufficient in law, he took issue upon the agreement.

The cause was tried before *Mansfield*, C.J. at *Guildhall*, at the sittings after last *Trinity term*, when the following case was proved.

One *Greenwood* and other creditors of *Marden* entered into an agreement, in writing, with *Weston*, that for and in consideration of a certain price, purchase, or consideration money by the said *Thomas Weston* paid or secured to be paid to each of them the said *Greenwood*, &c. by virtue of several bills of exchange drawn on and accepted by the said *Thomas Weston*, &c. they and each of them *did* promise and agree that the said *Thomas Weston*, his *executors*, &c. should and might have, receive, and take to and for his and their own use and benefit, of and from the said *Owen Marden*, his *executors*, &c. the several sums of money mentioned in the schedule thereunder written; and also that it should be lawful for the said *Tho. Weston*, his *executors*, &c. when and as he or they should deem proper, to sue, in the names of the said respective creditors, &c. and

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to give receipts and discharges for the amount of the said debts; and the said creditors did thereby agree to ratify and confirm all that *Weston* should do in the premises; and that they would, at the request of *Weston*, his *executors*, &c. do all acts necessary for obtaining a commission of bankruptcy against the said *Owen Marden*, and in case of his becoming a bankrupt, would prove their debts in due time, so as the said *T. Weston*, his *executors*, &c. might have the dividend or dividends: and they agreed not to discharge the debts, and to do all acts to vest the said debts in *Weston*, &c.; and *Weston* lastly agreed to pay all costs and charges in the recovery of such debts for his use, and to indemnify the creditors from all loss therein.

This agreement was signed by *Greenwood* and 19 other creditors for various sums, amounting in the whole to a very considerable sum; and all those creditors received, by bills on *Weston*, which were duly paid, the full amount of 10s. in the pound on each of their debts. When it was by *Weston*, at a meeting of the creditors, first proposed, for *Marden* to pay 10s. in the pound, *Anstey* agreed to it, and a deed of purchase of the debts by *Weston* was agreed upon; and *Anstey* promised to sign it, and then, as he was going out of town, he authorized *Greenwood* to sign it for him. *Greenwood* actually signed for himself, but omitted to do so on the behalf of *Anstey*; who, upon his return, denied that he had given such orders but afterwards admitted the agreement; but said that he had altered his mind, and would have 20s. in the pound. There was no stipulation at the time that unless all the creditors should accept the agreement it should be void.

His lordship said at the trial, "On the 2d plea, if the agreement was unconditional, I think it may be a good defence; or it is a defence upon the general issue; for it was the means of fraud on the other creditors."

And, it being objected that the agreement was void by the statute of frauds, his lordship said, the 10s. in the pound, which *Weston* agreed to pay, was not the debt of the *defendant*, but a new sum,

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Upon this there was a verdict for the *defendant*, with liberty for the *plaintiff* to move to enter a verdict for the *plaintiff* for 525l. if the court should be of opinion with him.

A rule for this purpose having been obtained, upon the ground that the agreement was not binding under the statute of frauds,

SHEPHERD and SELLON, *Serjeants*, for the *defendant*, shewed cause, and contended, that *Weston* becoming bound to pay the 10s. in the pound out of his own monies, he was bound, with respect to the *plaintiff*, notwithstanding the statute of frauds. With respect to *Weston* not being liable, it was immaterial whether the *plaintiff* or any person on his behalf signed or not. But though *Weston* had signed no deed himself, yet he had by means of the *defendant* made a binding agreement to pay the 10s. in the pound; and *Weston* did not then become bound for the debt of another person, but entered into a new and original promise for himself, the consideration of which was the assignment of the debts of the *defendant* to him, which assignment might by possibility become beneficial to him; *Roe v. Haugh*.* And this case is distinguishable from *Chater v. Beckett*,† because there there was no agreement that the creditor should release the original debtor, and the rights of the other creditors were not concerned, as they are here. It also differs from the case of *Curr v. Barber*.‡ Not that the debt was extinguished wholly, as against the *defendant*, but the *plaintiff* assigned his debt to

* 1 Salk. 29. † 7 Term Rep. 201. ‡ Sir T. Raym. 450.

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Weston, who was to stand in his place, and in that view of the case it is wholly out of the statute of frauds, and becomes an original purchase by *Weston* of a debt due to the *plaintiff*, which he can no longer enforce against the *defendant*.

MANSFIELD, C. J. "There is this difficulty, on that argument, namely, that here is a verdict for the *defendant*, which *Weston*, who says he is entitled to the debt, wishes however to stand. Now that will bar him for ever from recovering, though according to the last argument he is entitled to recover it in the name of the *plaintiff*, who is his trustee. If, however, he who is the interested party wishes the verdict to stand, we can, upon this motion for a new trial, have no objection to it."

SELLON, Serjeant, then cited *Butler v. Rhoder*,* to shew that the *plaintiff* was bound by the agreement with *Weston* and the *defendant*; and *Castling v. Ambert*,† to shew that there was a good consideration and a binding promise on the part of *Weston*; and he concluded that not only upon the principle of a fraud being committed by the *plaintiff*, with respect to the rest of the creditors, whom he induced to consent to take 10s. in the pound, by promising that he also would sign for his debt; but also upon the ground that the promise by *Weston* was an original promise, and not a collateral undertaking; and lastly, because there was a fund provided in the hands of *Weston*, which formed a consideration moving from the *defendant* to him; his promise was also binding in law, and therefore the verdict ought to stand for the *defendant*.

The counsel for the *defendant* not being then prepared to meet the last point of the case, namely the consi-

* 1 *Espinasse's N. P.* 236, *S. C.* *Peake's N. P.* 239.

† 2 *East*, 325.

dering it as a purchase of the debts, it was ordered to stand over; and it being observed that if the *plaintiff* succeeded at law, the *defendant* would probably go into equity.

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MANSFIELD, C. J. observed, that there was no necessity for directing the *defendant* to go into equity, because if it should appear that the *plaintiff* could not recover in his *own right*, the court need not disturb the verdict. That he thought in equity he could not be entitled to recover, on account of the fraud on the other creditors, particularly *Greenwood*, whom he induced to take less than their debts, by means of his promise to come in *pari passu*. That the promise to pay 10s. in the pound was a promise of a new sum, which never constituted a debt before, and *Chater v. Becket* was a great authority, although the case was not argued. He said, he remembered who was in it, and he knew from private information the reason why it was not argued; it was not from any conviction that it was not arguable, or that there was nothing in the point."

COCKELL and BAYLEY, Serjeants, for the *plaintiff*.
"It was not an agreement that the *debt* of the *defendant* should be bought or sold, but an engagement by one person to pay the debt of another, by paying a less sum in discharge; *Forth and others v. Stanton, Widow*;* and therefore the promise by *Weston* should have been in writing under the statute of frauds. And, if the 10s. had been paid, the *defendant* must have pleaded accord and satisfaction; for the payment would have operated as a release to the *defendant*; which proves clearly that it could be no sale of the debt, since the payment of the 10s. in the pound, the price of the supposed purchase, would have extinguished the debt. *Curr v. Barber* is not an authority for the *plaintiff*, but for the *defendant*."

* 1 *Sanders*, 210.

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MANSFIELD, C. J. "I do not think that case assists the *defendant*; but I do not understand it as to one point, and as to the other I have great difficulty upon the statute of *frauds*. I have no comprehension that there was not a good consideration for the promise of *Jacob the son*. He agrees to pay 9l. in satisfaction of the promises in the *declaration*; and why is not the giving up of the son's wife's clothes by the *plaintiff* a good consideration for that promise? It would be so in an action against the *son*, for not by the *plaintiff* paying the 9l. Upon the statute of *frauds* it is very strong. As to the case in *Espinasse*, the statute does not, as I see, apply to it. No promise by a third person to pay a part of a debt, in *consideration* of the *plaintiff's* discharging the whole, as against the original debtor, can be considered as coming within the statute of *frauds*; because it is not answering for the debt of another, but relieving the debtor from the whole debt. But however the cases the other way are very strong."

CHAMBRE, J. "The effect of the delivery of the clothes does not appear to have been considered by the court in *Carr v. Barber*; but it appears that the clothes in the *plaintiff's* possession belonged to the *defendant's* wife, and the giving them up without action was the consideration for the son's promise, which was a good consideration; but stripped of that part of the consideration, as to the rest it would stand as *accord*, without *satisfaction*, because the *accord*, with *satisfaction* only tendered, does not amount to payment. That is the case in this cause. *Accord* without *satisfaction* is not pleadable."

COCKELL, Serjeant. "*Roe v. Haugh* is also a case for the *plaintiff*; for that was after the verdict, and the court supplied something by intendment, namely, that it was a promise in writing which was not proved here."

MANSFIELD, C. J. "No, there would be no consideration unless there was an agreement to release the

debtor. But how that could be disputed one cannot well tell. What is the sense of the thing? If you'll take me as your debtor *instead* of A. you'll have 10s. in the pound. No such bargain can be made without its being an agreement to discharge the original debtor. The terms of the agreement in some of the cases are quite different; they import a security for a debt which still remains. But in *Roe v. Haugh*, the words "accept C. to be his debtor for 20l. due from A. *in loco*, A." imply the discharge of the original debtor; and ought to have been argued as an agreement to discharge him.

COCKELL, *Serjeant*. "*Lynn v. Brace** is also a decisive authority for the *plaintiff*, and this is, at the most, accord without *satisfaction*. *Read v. Nash* also, though not to the same point, is the same in principle, and *Fish v. Hutchinson*† likewise shews that the promise by *Weston* ought to have been in writing." He also endeavoured to distinguish the cases of *Castling v. Aubert*, and the other cases cited from *Espinasse's Nisi Prius Cases*.

BAYLEY, *Serjeant*, contended that the special *pleas* stated an agreement very different from that of a purchase of a debt still subsisting, and in fact brought the case precisely within that of *Chater v. Beckett*; and that the evidence amounted to nothing more than the statement contained in the special plea; for as to the agreement to keep the debt standing for the benefit of *Weston*, it was only a subsequent agreement with the other creditors under the deed, to which the *plaintiff* was no party.

MANFELD, C. J. "It was proved certainly by *John Weston*, that it was a part of the original agree-

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* 2 H. Bl. 317.

† 1 Wils. 306. 2 Wils. 94.

ment that the debts should be *purchased*; it is very true that it was not attended to at the trial; but the words in my notes are, however, that the deed of purchase of the debts was to be made to *Thomas Weston*, and he was to have the debts; that was a part of the original agreement. The meaning of which is this: here is a *docket* struck against the *defendant*, and the object of the bargain is to discharge him from the debts; but says *Weston*, though I may pay three or four creditors, yet a commission may still be taken out, and if I agree to pay 10s. in the pound, you must assign the debt, that in the case of a *bankruptcy*, I may stand in your place to receive a dividend, though I never intend to take it, unless there is a commission taken out, by which the funds assigned to me will be withdrawn from me. The single question is, whether in the odd situation in which the case stands, we shall be compelled to do injustice, by altering the verdict, where *Weston*, for whose benefit alone the money is recoverable, requires that it should stand. That will still leave the *defendant* liable to the costs of the special *pleas*. And though they are pleaded in full satisfaction of the debt, it was an agreement in full satisfaction, as to any right of the *plaintiff* to recover for himself. And there was a good consideration for the *plaintiff's* agreement; so that *Weston* might have brought an action against the *plaintiff* for not assigning the debt. Besides the *plaintiff*, appointed *Greenwood* to act for him, that is, to sign the deed; for *Greenwood* could then have nothing else to do upon that authority so given to him, as appears by the evidence. Upon which agreement and authority to sign it, the deed was actually prepared.

As to part of my brother *Bayley's* argument, it is extremely well founded, that the *special pleadings* in the case do not apply to the points on which this case will now remain to be decided; because the cir-

circumstances that form the subject of the pleas are not that, by the actual agreement between the parties, *Marsden* was to be discharged from all his debts, as is stated upon those pleas, but that there should be a purchase by *Weston*, of a still subsisting debt. Indeed, upon the trial, not much turned upon this purchase, though no doubt it was part of the original agreement. Brother *Bayley* then objected upon the ground of the statute of frauds. I was not aware at the time of the modern decided cases by Lord *Kenyon*, upon that subject, but it struck me as doubtful, at the trial, how a person who undertakes to pay a debt due from B. to C. and that undertaking is to be in discharge of the debt due from B. so that B. no longer remains the debtor, can in strictness be said to undertake for the debt of another, that debt being as to the other person discharged by the very bargain. I thought also that there was a great difference as to the *plea of satisfaction* between a stranger undertaking to pay a composition for another, and the debtor himself undertaking. For a debtor's undertaking to pay less than the original debt in discharge of the whole demand, is as has been truly observed *nudum pactum*; but the undertaking from a third person to pay a smaller sum in discharge of another's debt appeared to me good. It was an original debt newly created, whereby the original debtor was released. So it struck me, though there was no case cited at the trial, one way or the other. Considering then this as a new promise, the question is, whether upon this evidence, and considering this new promise as valid, justice is not done as things now stand? I do not think the *plaintiff* entitled to more than the strict rule of law will give him, and, by no means, to any favour. For what are the facts of the case? The *defendant*, who is the son in law of *Weston*, being greatly indebted to various creditors, in various sums of money, he is in

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danger of absolute ruin, and in fear of a commission of bankruptcy being issued, for a docket is actually struck. Some of the creditors, in this state of things, meet together, three of them in particular, of whom the *plaintiff* is one *John Weston*, representing his uncle, is present; they consider what is to be done; the effects, upon calculation, amount to 7s. 6d. in the pound only; and at last this contract, without reference to other creditors, is made, namely, an agreement to accept 10s. in the pound from *Thomas Weston*; and it is part of the transaction at that time that a deed shall be prepared by Mr. *Barrow*, the Attorney for *Weston*; the only object of which is to assign the debts due from the several creditors to *Weston*, who is to pay 10s. in the pound as the price of the debts, which they are to assign. Upon that fact, the question arises, whether an agreement between two persons, the one to sell a debt, the other to buy it, may not be by parol? and of that there can be no doubt. The *plaintiff* then agrees that *Greenwood* shall act for him; but nothing remained to be done but signing the deeds. The *plaintiff* goes out of town; *Greenwood* takes 10s. and signs the deed. *Wilson*, another creditor does not appear to sign the deed but accepts 10s. The *plaintiff* on his return altered his mind. First he denied his agreement; then upon being put in mind of it, he says "a man has a right to alter his mind till he has signed." So he has, it is true, in general; but what in morality and sound honesty is the case, when he has prevailed upon others, in consideration of his doing something agreed upon by parol between them, to give up the means of recovering the whole of their debts? I say, in point of honesty, there is nothing so contrary to it as the conduct of the *plaintiff*. It was as bad as getting privately a promise from the *defendant* to secure the whole of his debts notwithstanding an agreement publicly to take a composition with

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the rest of the creditors. In this situation the *plaintiff* comes here to set aside this verdict, in order to put into his own pocket and for his own benefit the other part of the debt beyond what *Weston* was to pay ; but at any rate, he is not entitled to it, but *Weston*, and he is perfectly satisfied with the verdict. And, if upon the real justice of the case, this be the real inclination of *Weston*, the verdict is perfectly right. The *plaintiff* has behaved with a considerable degree of oppression, by endeavouring to screw out of *Weston* the debt due from the *defendant*. Is the *plaintiff* under such circumstances entitled to any sort of favour from the court ; or is the court called upon to alter this verdict, though it is formally wrong, in favour of such a *plaintiff*. It might be different if it were in favour of *Weston*, who ought to have the fruits of such a verdict. I cannot, for myself, say that I feel any compassion for the *plaintiff*, in this situation of things : if he has been put to any expence by his law suit, he has been put to it by acting against the plainest dictates of honour and conscience ; which he himself must know, do not entitle him to any favour from the court ; and notwithstanding the odd situation into which the thing is got, this verdict which is in favour of *Weston*, and with his consent, ought not to be set aside. A great deal has been said about the *statute of frauds*, both now and at the trial. I would not have it supposed that I have any doubt upon any of the cases cited, as to the statute of frauds ; they all, certainly seem to prove that a promise must be in writing, if it is *merely* to pay the debt of another. Nobody can wish to restrain the operation of such a statute, as applied to such cases, because it is a most useful law. Those who practice in common law courts do not see so much of the real utility of its operation as the practisers in courts of equity. It is inconceivable what litigations and perjury parol agreements of that sort naturally lead to.

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Every body therefore must wish to carry the provision of that statute to their full extent ; and it must now be taken, that every agreement, though a *new* agreement to pay a less sum in discharge of a larger sum, for the debt of another, is within the statute of frauds, and requires to be in writing. But this is a new debt.

ROOK J. " I am of the same opinion with the Lord *Chief Justice*. It seems to me that this is the case of a purchase of a debt. The *plaintiff* is not the only person concerned in this case, because if he were suffered to recover, he would be guilty of a gross fraud upon the other creditors. *Weston* himself would be defrauded too. For if *Weston* had paid the *plaintiff* the 10s. in the pound, he would not have been safe. But he thought to defer the bankruptcy of his son-in-law by it, and the principal creditors came into the agreement to accept 10s. in the pound, upon the faith of this agreement ; and then he, the father-in-law, takes the debts upon himself, not having the chance of being reimbursed by the funds assigned to him in that case. The *plaintiff* authorized *Greenwood* to sign for him, and *Greenwood* signed for himself, as also did *Wilson* ; and they as well as *Weston* all acted upon the expectation that *Anstey* would perform his promise. I don't think *Anstey* ought to be permitted to say now I have tricked you all, and I will bring an action to recover my whole debt ; for that is the effect of his conduct."

CHAMBRE, J. " I think, upon the evidence, it is perfectly clear, that this was a contract to purchase the debts of the several creditors. Instead of being a contract to pay or discharge the debt owing by *Marden*, it was of the substance that these debts should remain in full force to be assigned to *Weston*. When he had purchased them, he did not mean to exact them rigorously ; but still the contract is a contract of purchase, and he had a right to make use of the names of the

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original creditors to recover the debts to the full amount, if *Marden* had effects to satisfy. Instead of being a contract to discharge *Marden* from his debts, it is a contract to keep them on foot, therefore *Anstey*, in that way of considering the case, had a right to recover from *Marden* for the use of *Weston*; but *Weston* now, instead of desiring an action to be brought in *Anstey's* name, wishes that *Anstey* should have no advantage from his verdict. Surely we, in the exercise of a discretionary and equitable power, which we have, of granting new trials, can never wish to set aside that verdict, which, in real justice to the parties, should stand. If the question had been that which it is represented to have been on the special pleas, I should have thought it a case within the *statute of frauds*, but it is now unnecessary to consider that point, because we all agree fully upon the point, that it is a contract for the purchase of the debts of *Marden*, which is not affected by the *statute of frauds*, though made by parol."

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ANSTAY
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MARDEN.

RULE DISCHARGED.*

TOWER against CAMERON and Another.†—May 21.

Plea of bankruptcy generally after the making of the promise without stating that the defendant conformed to the statutes of bankruptcy, &c. held good. Semble, the case of Paris v. Salkeld‡ is not law.

ASSUMPSIT on a promissory note by the defendant to the order of the plaintiff. Plea, *non assumpsit*; and that the said plaintiff *actionem non*, because the said defendant *Cameron*, after making of the said several

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* For the entire report of this case I am indebted to the kindness of the junior counsel for the defendant in the cause at *ami prius*, Mr. T. BARROW, and to his brother Mr. BARROW, who was attorney for the defendant.

† Roll. 1956. - Hik. 44 Geo. III.

‡ 2 Wils. 137.

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promises and undertakings in the said declaration mentioned, if any such were made, to wit, on the 9th day of December, A. D. 1803, at, &c. became a bankrupt within the intent and meaning of the several statutes concerning bankrupts, and that the said several causes of action aforesaid, in the said declaration, if any such exist, accrued, and each and every of them did accrue to the said *plaintiff* before such time as he the said *John* became a bankrupt as aforesaid, to wit, &c. and of this he puts himself upon the country.

The other *defendant* suffered judgment by *nil dicit*.

DEMURRER, by the *plaintiff* to the *defendant* Cameron's plea with causes, for that it is not stated that the said *John* became a bankrupt before the commencement of this suit, but on the contrary, it appears in and by the said plea that the said *John Cameron* became a bankrupt after the commencement of the said suit. And for that it does not appear in and by the said plea that any commission of bankruptcy hath ever been awarded or issued against the said *John* upon the said bankruptcy, in the said plea mentioned, or that the said *John* hath obtained his certificate under such commission and duly surrendered himself and conformed, as by the statute in that case made and provided is directed, or that such commission, certificate, and conformity, or any or either of them, took place, or that the said certificate was allowed by the Lord High Chancellor before the commencement of this suit. And also for that it is in and by the said plea alleged, that the said *plaintiff* ought not to have or maintain her said action; whereas inasmuch as the matter in the said plea, appears to have arisen subsequent to the commencement of the suit, it ought to have been pleaded in bar of any further maintenance of the said action: and also for that the said plea should have been pleaded *puis darrein continuance*, and the trading

petitioning creditor's debt, act of bankruptcy, commission of bankruptcy (if ever any issued), and subsequent proceedings under such commission, should have been specially set forth in the said plea.

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JOINDER in demurrer.

The point to be argued was stated as follows: as the defendant has only pleaded his bankruptcy generally under the statute 5 Geo. II. c. 3, s. 7, he should have expressly stated such bankruptcy to have taken place before the commencement of this suit; the general plea given by the statute being given to bankrupts only when they have conformed and obtained their certificates before the commencement of an action. But under the present plea, the defendant was equally open to have given evidence of a bankruptcy subsequent to, as prior to the action, and if the former, the facts should have been pleaded specially.

LAWRS, for the plaintiff, objected that the bankruptcy in this plea was not stated to have happened before the action, and he contended that this was necessary; first, from the general rules of pleading, and secondly, from the provisions of the statute 5 Geo. II. c. 3, s. 7. As to the first ground, he said that it was a general rule in pleading that "all the facts of every bar, pleaded in chief, should arise before the action, and be so averred;" and if it were otherwise, the defendant might, by matter subsequent, take the plaintiff by surprise, and might defeat a suit which was properly brought, and throw the costs on the plaintiff. In cases of set off, it is necessary the matter of set off should arise before the commencement of the suit. *Evans v. Prosser*,* *Papillon v. Le Bret*.† So in pleas of *plene administravit*.‡ And he said that in this case, though the data

* 3 Term Rep. 186. + 4 East, 502.

† Com. Dig. Pleader, 2 D. 9, § 81.

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9th December, 1805, was under a *scilicet*, yet that was immaterial. As to the 2d point, he said that the act of 5 Geo. II. c. 30, s. 7, gives the general plea of *bankruptcy* where the *bankrupt* has duly conformed and obtained his certificate previous to the action; but that if the *bankruptcy* happens after the action, it must be pleaded specially as before that act, *Paris v. Salkeld*;* and that in *Alsop v. Price*,† and in other precedents, the *bankruptcy* was stated to have happened before the action.

LORD ELLENBOROUGH, C. J. "This is a beneficial plea given to the party by a particular statute to avoid the difficulties of special pleading, and it is here pleaded in the very words of the statute; and whether it is a bar or not to the action is matter of evidence. I should look at the evidence, and should certainly not say that the only issue was, whether he was a *bankrupt* merely before the cause of action, but whether he had conformed and was entitled to the protection of the *bankrupt* laws; and it being concluded to the country, you might put that matter in issue."

LAWRENCE, J. "The doctrine cited from *Paris v. Salkeld*, is new in experience; and in *Cook's Bankrupt Laws*, p. 518, edit. 5, which cites *Willan v. Geordin*, Trin. 1782, B. R., it is said that the case of *Paris v. Salkeld* is not law."

SCARLET, for the *defendant*, cited *Miles v. Williams*,‡ which was a plea upon the statute previous to the 5 Geo. II. c. 30, and contained similar words.

LE BLANC, J. "But that was a plea of *bankruptcy* before the action brought."

JUDGMENT for the DEFENDANT.

* 2 Wils. 137.

† Doug. 160.

‡ 1 P. Wms. 258.

CAPP against TOPHAM.—May 17.

1805.

If an auctioneer places a ticket of a bidding under a Candlestick for the vendor, it is not sufficient to avoid the duty, in case there is no sale to a bona fide purchaser. And where one said to the vendor that he had done all to avoid the duty, and upon this was called upon to pay, held that he could not recover against the vendor for the duty paid.

CAPP
VERSUS
TOPHAM.

THIS was an action for money paid, laid out, and expended by the *plaintiff* for the use of the *defendant*. The *defendant* pleaded the *general issue*; and the cause came on to be tried at the assizes held for the county of *Lincoln*, before Mr. Justice *Heath*, on the 31st day of *July*, 1802, when a verdict was found for the *plaintiff*, with 38l. 15s. damages, subject to the opinion of this court on the following case:

The *plaintiff*, an auctioneer, was employed by the *defendant* to sell by auction an estate belonging to him in the city of *Lincoln*, and the *plaintiff*, by the direction of the *defendant*, put the estate up to sale on the 27th *January*, 1801.

One of the conditions of sale was in these words, "That the vendor shall fix his price, and seal it up in a piece of paper; and if the biddings go beyond the price fixed, the estate shall be considered as sold, but if the biddings fall short of the sum so fixed on, the estate shall not be considered as sold." This was the auctioneer's own condition, and originally dictated by him and adopted by him on this occasion as a proper mode to save the payment of the duty."

The *defendant's* solicitor who attended the sale previous to the commencement of the biddings, placed a ticket, with the *privy of the auctioneer*, containing the price in figures, and nothing more, under a candlestick on a table in the auction-room; *Bass*, the *defendant's* uncle, was present at the sale on behalf of the *defen-*

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CAPPE
VERSUS
TOPHAM.

dant, and asked the *plaintiff* if he had taken the proper precaution to avoid the duty, if there was no sale; the *plaintiff* said it was his mode to fix a price under the candlestick, and if the bidding did not come up to the price, there was no sale or duty.

There were several biddings for the estate, but the highest was under the sum specified in the said ticket, and the estate was by the auctioneer declared to remain unsold.

The *plaintiff* had not given three days notice of sale, and returned no sale. He was afterwards called upon by the collector of the excise to pay the duty, amounting to 29l. on the highest bidding, which he refused to do, but afterwards, on an action at the suit of the king being brought against him, upon his bond for non-performance of his duty, as auctioneer, he paid. to compromise the action, the sum of 29l. and 9l. 15s. being the costs of the said action.

The *plaintiff* previous to any proceedings against him called upon the *defendant's* solicitor, and informed him of the demand of the duty made by the collector of the excise, and frequently requested the payment of it, but he refused.

No notice *in writing* was given to the *plaintiff* of the price set down in the ticket, but the *defendant's* solicitor told him what it was. The *plaintiff* had no notice in writing of any bidding intended on account of the vendor other than the aforesaid ticket, and the conditions of sale which were publicly read in the auction-room, by the auctioneer, previous to the estate being put up to sale. At the time of the sale, the *defendant* was a minor, and this the *plaintiff* knew, but he came of age before the money was paid by the *plaintiff*.

The question for the opinion of the court is, whether the *plaintiff* is entitled to recover?

CLARKE, N. G. for the *plaintiff*. "There was no warranty by the auctioneer in this case, that he would avoid the payment of the duty; but it was made one of the conditions of sale that there should be no sale, unless it exceeded the price in the ticket. There was no previous notice, nor was this ticket signed."

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—
CAPP
versus
TORMAN;

LAWRENCE, J. "There is a certain course pointed out by the statutes which would have avoided the duty, and you have made a blunder, and rendered the party liable to the duty, instead of doing what you ought to have done to avoid it."

Lord ELLENBOROUGH, C. J. "Even if there was no warranty on the part of the auctioneer, and it was only a mutual error between him and the vendor, he cannot call upon his companion in error for a contribution; but it is clear that the *defendant*, who knew nothing about the business, asked him if he had taken the proper precautions to avoid the duty, and he said he had."

LAWRENCE, J. "I think there is evidence enough to amount to a warranty."

JUDGMENT for the DEFENDANT.

ENGLISH against PURSER.—May 17.

A declaration that A. on a certain day and on divers other days made an assault on B. held bad on special demurrer; aliter, if stated that A. on, &c. and on divers days assaulted B.

THE *plaintiff* declared in *trespass* "for that the said *defendant*, heretofore, to wit, on the 20th day of October, in the year of our Lord 1802, and on divers other days and times between that day and the day of exhibiting the *plaintiff's* bill against the said *defendant* to wit, at, &c. with force and arms made an assault on the said *plaintiff*, and then and there beat, wounded, and ill treated him, &c.

ENGLISH
versus
PURSER.

1803.

—
 ENGLISH
 VERSUS
 PURSER.

The *defendant* demurred specially, for that the said *plaintiff*, had in and by his said first count, alleged that on the 20th day of *October*, in the year of our Lord 1802, and on divers days and times between that day, and the day of exhibiting his bill, the said *defendant* made an assault on the said *plaintiff*; whereas by law the said *plaintiff* ought to have stated the said assault to have happened on some day certain, and not on divers days and times.

RUNNINGTON, for the *defendant*, was stopped by the court.

WOOD, *contra*. "In *Burgess v. Freelove*,* which was trespass for an assault on divers days and times, there were three counts all laid that the *defendant*, on divers days and times, assaulted, the *plaintiff*, and though *Best*, serjeant, for the *defendant*, cited the case of *Michell v. Neale*,† yet the court overruled the objection."

LORD ELLENBOROUGH, C. J. "Here the words are made an assault, which could not by possibility be at different times; assaulted may apply to different days."

LEAVE was given to the *plaintiff* to amend.

PRICE and others against WOODBURN—May 23d.

Where the defendant had changed the venue, and the plaintiff moved to bring it back, upon the ground that the cause of action did not arise wholly in that county, but partly in a third county, the court refused to bring it back, because the plaintiff could not undertake to give material evidence in the county to which he would bring it back.

The court will not bring the venue back, unless the party can undertake to give material evidence.

* 2 Bos. and Pul. 425.

† Cowper, 820.

THIS was a rule to shew cause why the rule obtained by the *defendant* to change the venue should not be set aside.

1805,
—
PRICE
VERSUS
WOODBURN.

The action was for goods sold and delivered. The goods were ordered at *Lancaster* of the *plaintiff* in *London*, and the venue was laid in *London*, but as the goods were actually shipped in the county of *Surrey*, the *plaintiff* could not undertake to give material evidence in the county of *Surrey*.

LITTLEDALE shewed cause, and after citing several cases, and giving the history of the practice of changing the venue, from the year books to the present time, relied upon the present practice, that the *plaintiff* must give material evidence in the county to which he brings the venue back.

BURROUGH, *contra*, cited *Herring v. Durant*,* in which it was laid down that the *defendant* could not change the venue unless the cause of action arose wholly in the county where it is to be changed to.

LORD ELLENBOROUGH, C. J. "As the goods were shipped in the county of *Surrey*, if that had been the first county in which the venue was laid, you could have made the usual undertaking. Having not laid it there, you must leave the other parties to change the venue. Otherwise we must be trying the question upon affidavits where the cause of action arose, and instead of making the rule to change the venue a rule absolute in the first instance, we ought to make it a rule to shew cause. It will certainly be better to adhere to

* 1 *Wils.* 178. This is so singular a case that it perhaps will not apply to many others. The contract was sworn to be made on a bridge between the counties of *Kent* and *Sussex*. The *defendant* could not swear that the cause of action arose in the county of *Kent*, and he took nothing by his motion,

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the old practice, that you shall not change the venue back again unless you agree to give material evidence in that county.

RULE DISCHARGED, but without payment of costs, because the party was misled by the case cited.*

B. R. KENNETT against DUFF.—June 7.

At nisi prius at Westminster, before Lord ELLENBOROUGH, C. J.

The bankrupt himself cannot, in trover, against his assignees, set up an act of bankruptcy previous to the petitioning creditor's debt, in order to defeat the commission. Quære, whether in any case it can be done to defeat a commission, unless a commission is set out upon such prior act of bankruptcy?

KENNETT
versus
DUFF.

THIS was an action of *trover* for certain deeds. The defendant admitted that the deeds belonged to the plaintiff, and that he had them in his possession: but set up a commission of bankruptcy against the plaintiff, under which they had been taken by the messenger to the commission.

The SOLICITOR GENERAL, for the plaintiff, offered to prove an act of bankruptcy prior to the petitioning creditor's debt, upon which this commission was founded,

Lord ELLENBOROUGH, C. J. "Upon that point, when it is made out in evidence, I shall have a decided opinion, and I wish you to take the opinion of a court of error in the most solemn manner. I should wish that question to be discussed, and I believe it is a general wish in the profession that it should be so, in a case which is less open to objection than this. The po-

* This case was omitted by mistake in page 423, *ante*.

ition appears to me altogether absurd, that you shall be allowed to defeat one commission by setting up a previous act of bankruptcy, when no other commission is sued out. It has been held so; indeed, in a case where two creditors were the litigant parties, but not where the bankrupt himself is the party; and though I am bound by the decision at *nil prius*, yet I shall not extend the doctrine any further. Here, at any rate, you cannot recover, because you shew that some other persons are entitled to recover; for you cannot be in a better situation than you would be in, if the commission was taken out.

His lordship said he would reserve the point, but the plaintiff failed in the proof of his case. It appeared also that some of the deeds were made subsequent to the first, but previous to the second act of bankruptcy, and there was a

VERDICT for the DEFENDANT.

ATTREE, One, &c. against SCUTT:

Where there is a custom in a manor for the payment of a separate set of fees to the steward, upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; two sets of fees become due and continue payable, although the land is afterwards conveyed to one person, as in the case of indivisible services.

THIS was an action brought by the plaintiff, steward of the manors of *Brightelmstone* and *Atlingworth* in the county of *Sussex*, against *Benjamin Scutt*, for bills of fees, &c. for business done at two courts, held for the said manors, amounting to the sum of 80l. 15s. 4d.

The defendant paid 64l. 11s. 2d. into court, and upon the cause coming on to be heard, at the last summer assizes holden at *Lewes*, in and for the county of *Sussex*, it was agreed by the counsel on both sides, that a verdict should be entered for the plaintiff for the sum of 16l. 4s. 2d. subject to the opinion of the court of *King's Bench*, on a case, which stated as follows, viz.

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SCOTT.

"The plaintiff on the 5th of December, 1799, was and still is steward of the said manors of *Bright-helmstone* and *Atlingworth*, which manors are adjoining to and intermixed with each other; that by the custom of each of those manors, every copyholder upon death or surrender, is liable to an *heriot* for every separate or distinct tenement holden of such manor; and that it has been the constant usage for the steward to demand and receive a separate fee or set of fees upon the surrender of or admission to each separate tenement so liable to a separate heriot.

That *Richard Tidy*, being seised in fee of five separate copyhold tenements, holden of the manor of *Bright-helmstone*, and of five other separate copyhold tenements holden of the manor of *Atlingworth*, and having surrendered his copyholds in both manors to the use of his will, by his will, dated the 26th of December, 1788, devised all the rest and residue of his real estate (which comprized the copyholds in question) to *Richard Lemon Whichelo* and *Thomas Scutt*, and their heirs, as tenants in common, and died without revoking such will.

That on the 7th of July, 1789, at courts holden for each of those respective manors, the said *Richard Lemon Whichelo* was admitted under the said will, to one undivided moiety, or half part of the five tenements, respectively, holden of the said manor, whereof the said *Richard Tidy* died seised; and at the same courts the said *Thomas Scutt* was admitted to the other moiety thereof respectively.

That the said *Richard Lemon Whichelo* and *Thomas Scutt* agreed to make partition of the estates devised to them as aforesaid, pursuant to an award to be made by Messrs. *Hicks* and *Bradford* who made an award accordingly, describing the specific pieces to be allotted to each party, but, before the same could be carried into execution, the said *Thomas Scutt* died,

having previously surrendered his copyholds in both manors, to the use of his will, and by his will, dated the 26th of October, 1794, devised the same to his son *Benjamin Scutt*, the *defendant*, his heirs and assigns.

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—
ATTORNEY
VERSUS
SCUTT.

That at courts holden for each of the said manors, on the 25th of June, 1796, the *defendant* was admitted under his father's will to an undivided moiety or half part of the five tenements respectively held of each manor.

That at courts respectively holden for each manor on the 5th of December, 1799, before the *plaintiff* as steward, the said *R. L. Whichelo*, for the purpose of carrying the said partition into execution, surrendered all his undivided moiety, or half part of, and in such of the specific pieces of land, as by the award of the said *Messrs. Hicks and Bradford* were allotted to the said *Thomas Scutt*, describing them specifically, by their boundaries and abuttals, and also describing of which of the specific tenements formerly holden by the said *Richard Tidy* they formed a part, to the use of the said *Benjamin Scutt*, and his heirs; and the said *Benj. Scutt* surrendered his undivided moiety of and in the specific pieces allotted to the said *Richard Lemon Whichelo*, in like manner, to the said *Richard Lemon Whichelo*, and his heirs; upon each of which surrenders and admissions, five sets of fees were claimed in each manor, of the said *Benjamin Scutt*, and five of the said *Richard Lemon Whichelo*, which fees were admitted to be due and form a part of the sum paid into court.

Afterwards, at the same courts, respectively, the said *Benjamin Scutt*, the *defendant*, surrendered a part of the lands so allotted to him, describing each piece by its abuttals and boundaries, and further describing some of the pieces so surrendered, as being together part or parcel of one of the tenements late *Tidy's*;

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others of them as being together part or parcel of a second tenement, late also *Tidy's*; others again of a *third*; others of a *fourth*; and others of a *fifth*; and annexing the description of each tenement, as given in the former court-rolls; to the use of *John Whichela* and his heirs, who was accordingly admitted.

Upon these last surrenders, the steward claims *ten* distinct sets of fees in each manor, as and for *ten* distinct and separate tenements, viz. *five* sets of fees for the *moiety* of *five* tenements, which was in the *defendant* under his father's will, and *five* sets of fees for the *other-moiety* thereof, which he took under the surrender from *Richard Lemon Whichela*. Question, whether these are to be taken as *ten* distinct tenements, in each manor, so as to entitle the *plaintiff* to *ten* sets of fees, or as *five* tenements in each manor only; if they are to be taken as *five* only in each manor, then the verdict to be entered for the *defendant*, the sum paid into court being sufficient to cover what is due; but, if they are to be taken as *ten* tenements in each manor, then the verdict to be entered for the *plaintiff*, damages 16l. 4s. 2d. but the *quantum* of the damages to be subject to the award of *Thomas Partington* and *George Courthope* the younger, esqrs. It is further agreed that the will of *Richard Tidy*, the several admissions and surrenders stated in the case, and the award of Messrs. *Hicks* and *Bradford*, together with a deed of partition, made in pursuance thereof, and any part of the court rolls of the said manors, which the counsel for either party may require, or which the court may think necessary, shall be read on the argument of the above case.

WATKINS, for the *plaintiff*. "The question here is whether, if there are two tenants in common, and one of them surrender his tenancy in a moiety to the use of another in severalty, and that other be admitted, and the other moiety becomes also vested in him, the person who is so admitted shall hold the

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premises as two moieties, or as an entirety, or in other terms as one tenement or two; and whether, if two moieties become vested in the same person, they shall by operation of law, become one tenement, or remain two moieties. Now the *defendant* and *Whichelo* held their moieties as two tenements. This the terms of the surrender of the 1st *December*, 1799, sufficiently import, for they are said to hold as tenants in common. By the surrender of *Whichelo* to *Scutt*, *Whichelo* conveyed, and *Scutt* was admitted to a tenement which he never held before; and the question is, whether that which has once been severed and made two tenements, can, by the act of the copyholder, cease to be two tenements, and be considered only as one. In *Waldoe v. Frances Bertlet*,* widow, it is held that the act of the lord shall not prejudice the copyholder's estate, and so, *et converso*, it must follow that the act of the tenant shall not be permitted to prejudice the lord. This principle applies even to the construction of acts of parliament; for it is held that where a statute contains general words which would comprehend copyholds according to the ordinary construction, yet if it should operate to prejudice the lord, the general words of such act shall not extend to copyholds.† And for this reason, the statute *de donis* does not extend to copyholds."

He was here proceeding to shew that the revenue would be prejudiced by holding them to be only one tenement, when,

LORD ELLENBOROUGH, C. J. said, "As to the stamp-acts, the party acts at his peril, and, without looking at the consequences to the revenue, the question will be, whether by the legal re-union these tenements have not become one."

* *Cro. Jac.* 576.

† *Cart. 20b. Comp.* 790.

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WATKINS. "Though united in one person, the tenements may still be several, and a man may be tenant in common, with himself, for certain purposes. As, where there are two moieties, the one which the party takes by purchase, the other by descent *ex parte maternâ*; there, for the purpose of keeping the descents clear and distinct, the tenant must hold them as tenant in common with himself, in two distinct moieties. So where one has one moiety for life, with a contingent remainder, and holds the other moiety as a purchaser in fee, there also; either he must hold, as tenant in common with himself of two moieties, or else the remainder over would be destroyed. The union, therefore, in this case, would not take place for the like reason, because it would operate to the injury of a third person, namely, to the prejudice of the lord in depriving him of his fine; and for this purpose, of preserving the rights of a third person, there are many instances in the books of a man holding as tenant in common with himself.—As in the cases put by *Littleton*, in his *Tenures*, sections 303, 304.

BEST, Serjeant, *contrâ*. "The case is altogether novel; no case or *dictum* even has been cited in support of it; and the point contended for will establish a claim for fees, which will be greatly to the prejudice of copyhold tenures. If it is law, copyhold tenures will be destroyed; for suppose a man has ten children, and devises to them as tenants in common, and they afterwards agree to a partition. Then the lord is to have ten fines; but upon a partition it must again increase, and the steward will take double the number of fees. In this case there would be at first ten tenements, then they would be divided into moieties which make twenty, and upon the next conveyance to a tenant in common there would be forty, and so *in infinitum* in a duplicate ratio in geometrical progression, till the amounts of the fines and the fees will exceed the value of all the manors in the kingdom. The conse-

quence of such a division would be to ruin both the stewards and the lords, since no body would be found to take such an admission. The first principle contended for is, that the lord can do nothing to the prejudice of the tenant; nor the tenant to the prejudice of the lord. That being so, the rights of the lord are not in this case diminished, but rather increased, for he gets twenty fines instead of five. Then as to the argument that these tenements must be several, because being once severed, they might in a possible case be descendible to different heirs, it is sufficient to say, that the case does not occur here; but that, there being no reason of that kind for continuing the tenancy separate, the law will not hold it so separate for the purpose of giving to the steward two sets of fees. So, although where there is a reason for it, a man may be tenant in common, with himself, as where he is tenant in tail of one moiety, and tenant in fee of the other; yet where there is no reason for it there shall be no such tenancy in common. Where there are two copyhold estates held separately, and they are conveyed to one person, there they pay different *finés* and *heriots*; but that may be, because unless it were so, it would not, in course of time, be easily known, whether the estates were separate or not; but that reason cannot apply to this case where the estate is originally held in common."

LAWRENCE, J. "Where a person having an estate subject to entire services and heriots, conveys part of it to another, in common, the entire heriot and service is multiplied; and when the estates come together again, the services still continue multiplied, because an entire service cannot be severed."

BEST, Serjeant. "If two tenants in common purpose to convey by surrender in the lord's court to a third person, then there is only one fine due, and one heriot, and the steward could be entitled only to one set

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of fees. ' If two-joint-tenants, two tenants in common, or one for life, and he in remainder join in the surrender, one fine only is due, and it shall enure as one grant only.' *Coke's Copyholder*, 130.* So in this case the steward should be entitled only to five sets of fees."

WATKINS. " The reason given in the book, for the doctrine that one fine is due is, this " for they are but the same estate, they are parts of one whole." But two tenants in common have different estates, so that it can never apply to two tenants in common. No inconvenience can arise from the multiplication of fines, because if the services are divisible, they may be divided; but indivisible services, such as heriots, must be multiplied. Every inconvenience which will follow from the claim of the *plaintiff* in this case will follow from the doctrine of the multiplication of heriots, when any one conveys part of a tenement to another with an indivisible service; and the same reason applies in support of both, that, whatever inconvenience there may be, it arises from the act of the tenant himself.

LORD ELLENBOROUGH, C. J. After stating the case. " The question in this case as stated by the *plaintiff's* counsel, amounts to this, whether, if two persons are tenants in common of one tenement in moieties, and one of them surrender to the use of the other, whether he shall hold this land as one tenement or two. It has been settled so long ago as 34 *Edw* III. *Heriots*, that if my tenant, who holds of me by a *heriot*, aliens parcel of his lands to another, each of them is chargeable to me for a heriot, because it is entire; and although the tenant purchases the land again, &c. I shall have of him, for each portion, a heriot. From thence it follows, that, if an estate, held by indivisible services, is divided, and,

* *Vide* 4 *Co. Rep.* 27, b. This, though cited in *Coke's Copyholder*, does not apply.

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afterwards by the act of the party, it comes again into one hand, the service shall be payable for each parcel respectively, and that they do not again become one tenement with respect to the lord or the services due in respect of the tenure. It has, indeed been contended, that this might be so where the person to whom such parcel of the land was conveyed, held in severalty; and where therefore, after an actual division of the tenements, it might be difficult in course of time to ascertain whether they were originally one tenement or two, when they afterwards came into the possession of one tenant; but that a conveyance to a number of tenants in common is not such a severance of the tenement as would subject the lord to that inconvenience, or entitle him to more than one heriot, and consequently that the rule would not apply to such a case. But to this we do not assent; tenants in common convey, each having a separate title; every one of them is to do several services; and one may enfeoff the other, because his freehold is several: but for the same reason he cannot release. In addition to the authority of Lord Coke, it was observed by Holt, C. J. in the case of *Fisher v. Wegg*,† where he was contending in favour of construing a devise to be a joint-tenancy instead of a tenancy in common; that, "as long as the joint-tenancy continues, there is a joint-tenure; but when the tenancy becomes in common, then the tenures and services are several, 6 Co. 1, 2, and by such construction as my brothers make in this case," viz. construing the devise a tenancy in common, "instead of one copyhold estate and one fine and a single service, there would be five several copyholds and as many fines and services." And as to the passage which is cited from *Coke's Copyholder*, s. 56, where it is said "if two joint-tenants, two tenants in common, or tenant for life and he in the remainder

† 1 P. W. 141 Salk. 392.

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join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only;" we think there must be some mistake in the print, the passage referred to, *Co. 4, fol: 17, b*, being wholly silent as to any such doctrine; and though the law there laid down may be applicable to joint-tenants, yet it may be well doubted as to tenants in common, who have several estates. For "if two tenants in common of a carve of land lease the same *carve* unto a stranger for life, reserving unto them ten shillings, this shall take effect as several leases, and either of them shall have but five shillings;" *Perkins*, s. 107. And in the same book, s. 106. "If two tenants in common of a carve of land join in a grant of a rent-charge of 10l. issuing out of the carve of land to another man, that will enure as several grants."(*) The reasons alleged for this shew that a conveyance by several tenants in common is a conveyance of a distinct estate by each. Their separate estates coming into one hand will not unite them again. It is to be seen, therefore, why the same rule in law should not apply to both cases, not only where such persons have an actual conveyance and estate in severalty, but where they hold a several estate in common. Now there is no authority to shew that the same rule does not apply; and the mode of occupation of the land can have no effect in respect of the tenure. It is admitted, indeed, that if there be a sufficient reason for separating the estate, which one man may have in himself, it shall be considered as a separate estate; and on that account a man may be tenant in common with himself; *Co. Litt.* 198. Is that maxim applicable in this case? We think it is, and that as in the case of the heriot, which, being due for the whole land, and

(*) His lordship also quoted *Plowden* to this point; but I am not able to state precisely the passage. But see *Co. Lit.* 197, a. *Plow. Ill.* and *Grange's case*, 171. 5 *Rep.* 7, b. *Plow.* 289, b.

the land being afterwards severed and conveyed to two tenants in common, becomes multiplied, and when the land becomes united in one tenant again, the two heriots and services are due; so here two sets of fines must be due. In that case the tenant may be said to hold in a manner very little different from one who is tenant in common with himself. As to the arguments which have been urged from the supposed reason of this doctrine as applied to heriots, that the ground of it is, that the land being once severed, the lord should not be put to prove whether it was ever held as one tenement or not, they do not seem to apply. We are therefore of opinion, notwithstanding the inconveniences of the case, and the great expence which may be incurred by the division of tenements, that as the law now stands there must be

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SQUIT.

JUDGMENT for the PLAINTIFF.

ELSON and Another against ROLFE.—May 21.

To debt on arbitration bond of all matters in difference, averring that the arbitrators took upon themselves the arbitration, and awarded, &c. The defendant pleaded that all matters were submitted, &c. that there were disputes as to monies claimed by him of the other party, and that the arbitrators took upon themselves to arbitrate of and concerning, &c. and that they made no award of those sums. The plaintiff replied, that the arbitrators made their award of and concerning, &c. as in the declaration: to which there was a demurrer: held, that the plea was bad for want of averring that the arbitrators had notice of the claims of the defendant, and refused to arbitrate concerning them.

DECLARATION in debt, for that whereas certain differences and disputes having arisen between the said defendant of the one part, and one *R. Hayes* and the said plaintiffs, (trustees of the estate and effects, of the said *R. Hayes*, of the other part,) the said defendant and also the said plaintiffs by certain bonds of arbitration, bearing date, &c. became bound, &c. which said

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bonds were respectively conditioned to abide to the award, arbitrement, final end, and determination of one *Samuel Page*, and *George Scott*, and one *Charles Alex. Craig*, or any two of them, arbitrators indifferently elected and named, as well on the part and behalf of the said *defendant*, as of the said *plaintiffs*, trustees as aforesaid, to arbitrate, award, order, judge and determine of and concerning all manner of action and actions, &c. between the said parties, or either of them, or by or between the said *defendant*, and the said *plaintiffs*, so as the said award of the said arbitrators, or any two of them, be made in writing under their hands, or under the hands of any two of them, ready to be delivered to the said parties in difference, or such of them as should desire the same, on or before the 1st day of *December* then next ensuing. And whereas the said *Sa. Page*, and the said *Alex. Craig* two of the said arbitrators, having taken upon themselves the said arbitration, did in due manner and within the time for that purpose appointed, to wit, on the 1st day of *December*, 1804, at, &c. duly make and publish their award in writing, under the hands of them the said *Samuel Page* and *Charles Alex. Craig*, of and concerning the matters in difference between the said parties, ready to be delivered to the said parties, &c. and thereby did, amongst other things, award and determine that the said *defendant*, his executors or administrators, should on, &c. pay to the said *plaintiffs*, or one of them, as such trustees as aforesaid, the sum of 122l. 12s. of lawful English money, at, &c. as the balance and in full payment, discharge, and satisfaction of and for all monies, debts, dues, and demands, due and owing to the said *plaintiffs* as such trustees as aforesaid, by or from the said *defendant*, upon any account whatsoever, up to the day of the date of that award." The *plaintiff* then averred notice of the award, and alleged a breach in the non-payment of the sum awarded.

PLEAS, first *nil debet*: secondly, that, before and at the making of the said bonds, &c. divers disputes subsisted between the said *defendant* and the said *R. Hayes* concerning divers sums before that time, claimed to be due from the said *R. Hayes*, to him the said *defendant*, which said disputes were submitted as well by the said *plaintiffs*, as by the said *defendant*, to the arbitrement of the said arbitrators, to wit, on, &c. and that the said arbitrators then and there took upon themselves to arbitrate, &c. concerning the same, to wit, on, &c. And that the said arbitrators did not, nor did any two of them, on or before the said 1st day of *December*, make any award, &c. in writing, concerning the aforesaid disputes, controversies, and differences so submitted to them as aforesaid, according to the form and effect of the said submission; but that the same still are and remain unsettled and undetermined between the parties," &c. And this, &c. wherefore, &c.

REPLICATION, that the said *Samuel Page* and *Charles Alex. Craig*, two of the arbitrators, in the said declaration mentioned, did on the said 1st day of *December*, in the said declaration mentioned, make their award, &c. in writing, in manner and form as in the said declaration is mentioned, to wit, at, &c. and this the *plaintiffs* pray may be inquired of by the country, &c.

DEMURRER and JOINDER in DEMURRER.

Issue was joined on the plea of *nil debet*,* and a verdict was found for the *plaintiff*.

MORRIS, E. for the *plaintiff*, ABBOTT in support of the *demurrer*.

* This plea it seems, was altogether bad; see *Saunders*, 187, a (n. 2); but no notice was taken of this in the present case. Q. also was not the declaration itself bad, for want of averring a submission on the part of the *defendant*? See 2 *Saunders*, 61 (h) n. 2. *Semble*, this defect was cured by the second plea of the *defendant*.

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and Another
ROUSE.

1805.

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parish where the house is situate. The cases of an early date which have been cited, occurred before the action of *assumpsit* for use and occupation was allowed and when it was necessary to shew a particular demise; and therefore are not applicable to the present case. In the case of Sir *R. Grabham v. Thornborough*,* it will appear that the ground of the decision was not that the *plaintiff* had omitted to state a venue, but had omitted that which was a part of the necessary description of the subject of the contract. The venue here is not now necessarily local, so that the rules as to venue which have been referred to are not applicable to this case: they apply only to cases when there was a strict rule as to the venue, in order for the jury to be summoned from the actual *vicinage*: but as the necessity of having the jury from the immediate *vicinage* no longer exists, the rules for pleading cited for the *defendant* do not apply. Here is no defect of venue; the venue is laid in *London*; and in actions of *assumpsit* for use and occupation, it is not necessary to state a place where the message is situate."

LORD ELLENBOROUGH, C. J. "Is that so in practice? Has it ever occurred, in any case which came before the court, to omit it? For the purpose of courting an experiment it is indeed omitted here, but I question whether it has ever been the general practice to omit it."

WIGLEY then referred to a note by *Williams, Sergeant*, in 1 *Saunders' Reports*, 233, where he recommends that in case of a lease, a description of the premises should not be set out.

ESPINASSE was heard in reply.

LORD ELLENBOROUGH, C. J. "The moment it

* *Hob.* 82.

laid down that an action of debt will lie for use and occupation, the action of debt attracts to itself all the generality of pleading which is allowable in the ordinary count for use and occupation in assumpsit. The question in this case will be, therefore, whether a count in assumpsit, so framed as this is, and omitting to state the place where the message is situated, would be bad. Now it appears to me that if it were held to be necessary so to state it, it would introduce a degree of nicety and exactness which might be the means of turning round a *plaintiff*, and causing him to be nonsuited on a point of no importance. A general action is given by the statute for use and occupation; and in the general form of declaring for goods sold and delivered, or for bodily labour done and performed, even there the one must be delivered and the other done in a particular place, but yet that place and many other unimportant circumstances are omitted. If the *plaintiff* should yet charge the *defendant* with another action, he may now say that he has been sued before, averring such circumstances for identifying the causes of action as may be necessary, including an averment of the local identity of the premises. This is as much particularity as is necessary in either of the cases which I have mentioned, and in this a greater strictness is not necessary."

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GROSE, J. "I am rather sorry that this sort of experiment in pleading should be tried, but at the same time I think there is great convenience in declaring in this general form, and there would be some injustice done by defeating the *plaintiff's* demand. As to the inconvenience which it is said may arise from the *defendant's* not knowing the charge against him, it is every one's practice to take out a bill of particulars of the *plaintiff's* demand, and if he desires to know what the premises are for the rent of which this action is

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brought, he can do so, and may probably be able to state the fact at this moment, as well as the *plaintiff*. But it is said that this accuracy in stating the place is not only necessary in order to let the *defendant* know what he is to pay, but also to prevent another action from being brought for the same thing; but if it were brought, he might allege that the two actions were brought for the same thing; and it is not necessary to state in this declaration where the premises were, because he must aver in his plea to such other action that it is brought for the same cause of action, and for the rent of the same place. And as this plea can be made, I am not for turning round the parties in this way; I am rather for saying that this will do by analogy."

LAWRENCE, J. "I see no inconvenience to the *defendant* in this sort of general form of declaration, and the cases alluded to do not particularly apply to this case. If any of the facts actually occurred, which are stated in the causes of demurrer, a plea might very easily be framed to meet the case. As to the statement of the situation of the house, it is the usual form to allege the occupation to be of a certain messuage in a certain place, but if the *plaintiff* does state it so, he must prove it as laid, and, if the place happens to be in two parishes, he will find some inconvenience. It is said by Mr. *Espinasse* that this action is founded on its locality. In that case it must be shewn to be in a certain place; but it is no such thing. It seems, from a passage in Lord *Coke* that where there is a lease, the venue must be laid where the lease is; but it does not appear whether the declarations there were by the assignees of the lessor or not. If they were, they must have been laid in the place where the land lay. In the action of debt, you must state the entry and occupation of the lessee, and anterior to the statute *Car. II.* it might be necessary to try the cause in the county where the premises lay, but now there is no mistrial, though the jury should not come out of the

immediate vicinage. The reasoning of those cases, therefore, which occurred anterior to that statute, cannot apply to this case, whatever may be the ground of them; and after the case of *Wilkins v. Wingate*, 6 Term Reports, I do not think it can be necessary that greater particularity should be had in the form of declaring in debt than in *assumpsit* for use and occupation."

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Kane
versus
Franklin

LE BLANC, J. "I should not be inclined to make any great stretch of the formal rules of pleading in order to support a novel experiment of this kind; because, I think it might have been as well to have adhered to the usual practice and the old precedents. But when the court got rid of the particular form in the case of *Strotod v. Rogers* they held that a general action for use and occupation may be brought, without laying a particular place where the messuage is situate. But it is said that the particular place was set out in that case; yet as the court held the declaration good in every other respect, they would, no doubt, have held this omission also good. Indeed when they held that the general action for use and occupation would lie in debt, I cannot see why they should require this particularity in the declaration, which would enable the *defendant* to turn the *plaintiff* round upon a particular circumstance of no importance."

JUDGMENT FOR THE PLAINTIFF.

GOODTITLE *ex dem.* DANIEL against MILES.—

June 27.

A. being seised of the reversion in fee of lands at P. expectant upon an estate for life in himself, with remainder in tail to his daughters, and also seised in fee of a coppice at A.; devises sundry other estates, and then devises all other his freehold, copyhold, and leasehold lands and houses, or tenements, which he should be possessed of at his decease, and which are not settled in jointure, on his late wife, except the coppice at A. which he wills shall always go

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with his estate at P. in the same manner as that estate is settled, to one of his daughters in tail, remainder to another for life, remainder to her children, remainder over, chargeable with an annuity to the said second daughter, and other charges. Held, that the reversion did not pass by this devise, it being wholly inconsistent with the object of such a devise, and therefore not in the intention of the testator.

THIS action of ejectment was brought for the recovery of a messuage and lands in the parish of *Ledbury*, in the county of *Hereford*, and was tried at *Hereford* summer assizes, 1804, when a verdict was found for the plaintiff for three-fourths of the premises, subject to the opinion of the court on the following case.

By indentures of lease and release, bearing date respectively the 1st and 2d of *April*, 1709, made previously and in order to the marriage of *John Morton*, the younger, of *Callow Hills*, with *Joanna Charlett*, spinster, the premises in question, with other lands, part freehold and part copyhold,* were limited expectant on the solemnization of the said then intended marriage, to the use of him, the said *John Morton*, for his life, remainder to the use of the said *Joanna Charlett* for her jointure. And from and immediately after the decease of the survivor of them, the said *John Morton* and *Joanna Charlett*, then to the use of the heirs of the body of the said *Joanna Charlett*, by the said *John Morton*, lawfully to be begotten, and for want or in default of such issue, then to and for the use and behoof of the right heirs and assigns of the said *John Morton* for ever.

By the same indenture of release, a messuage and lands therein particularly mentioned, situate in the several parishes of *Pixley* and *Aylton* in the said county of *Hereford*, (of which a coppice, called *Short Croft*,

* These lands originally came from the settler, *John Morton*. This fact was added to the case after the argument.

and the soil thereof, situate in the said parish of *Aylton*, constituted part) were conveyed to the following uses, viz. as to the whole (except the said coppice) to the same use as the premises in question are above mentioned to be conveyed and settled; and as to the said coppice, the same expectant on the solemnization of the said marriage, was limited unto and to the use of the said *John Morton*, his heirs and assigns for ever. The said marriage took effect, and the said *Joanna* died in *November*, 1738, leaving, by her husband, the said *John Morton*, who survived her, four daughters and no son, viz. *Judith*, *Joanna*, *Anna Margaretta*, and *Rebecca Judith*. The eldest of the said daughters intermarried with *William Skynner*, in the year 1740, and by the settlement made on this marriage, in which the said *John Morton*, her father, joined, the reversion in fee of him the said *John Morton*, of and in the undivided fourth part, or share of which the said *Judith* was seised as tenant in tail in remainder, of and in (*inter alia*) the premises in question (subject to certain precedent estates, now expired,) was conveyed to the use of the said *William Skynner*, his heirs and assigns for ever.

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After making the said settlement, the said *Joanna Morton* and *Rebecca Morton*, two of the said four daughters, died without issue, in the life-time of their said father, and *Anna Margaretta* intermarried with one *Henry Jones*.

The said *John Morton*, being seised of the reversion in fee of and in three undivided fourth parts of the premises expectant on the determination of the estate-tail in remainder, then vested in his said two surviving daughters, and being also seised of and in the following hereditaments, viz. of and in the said coppice in the parish of *Aylton*, and of and in a cottage and lands called *Brokington* in the parish of *Mansley*, a messuage, farm, and lands, called *Kensop*, in the parish of *Avonbu-*

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ry, in the county of *Hereford*, and of and in a moiety of a messuage and garden, called *Tower Hill*, in *Bromyard* in the said county of *Hereford*, he the said *John Morten* duly made and executed his last will and testament in writing, bearing date the 12th of *January*, 1750, in the words following, that is to say, after several pecuniary legacies, one to his daughter, and the rest to the poor of several parishes:—

“ Item, I give to the poor of the parish of *Avonbury*, in the said county of *Hereford*, 20s. to be disposed of by the minister of the said parish and the tenant of my estate at *Kewsope*. Item, I give and devise to my daughter *Judith Skynner*, and to her heirs and assigns for ever, all that my cottage, with the lands thereunto belonging, called *Brokington*, lying and being in the parish of *Mansley* aforesaid, upon trust that she and they shall yearly for ever buy four garments, two for men, and two for women, of the value of about 10 or 12s. and give the same to the most deserving poor persons of the said parish of *Mansley*, on *St. Thomas's day* yearly. And I further give and devise unto my said daughter, *Judith Skynner*, and to the heirs of her body, lawfully begotten, or to be begotten, all that my messuage or tenement, farm, lands, meadows, leasows, and pastures, with the appurtenances thereunto belonging, called *Kewsope*, in *Avonbury* aforesaid, charged and chargeable with the payment of 20s. a year to the poor of the said parish of *Avonbury*, and to the poor of the parish of *Mansley* for ever; and also all that moiety or half-part undivided, of a messuage and garden called *Tower Hill* in *Bromyard*, in the said county of *Hereford*, and all other my freehold, copyhold, and leasehold lands, or houses and tenements, with their and every of their appurtenances, whatsoever and wheresoever, which I shall be possessed of or any wise entitled unto at the time of my decease, and which are not settled in jointure on my late dear wife, (except the coppice at *Ayton*,

which I will and direct shall always go and be held with my estate at *Pixley*, in the same manner as that estate is settled,) she my daughter *Judith* and the heirs of her body, paying out of all the aforesaid lands, unto her sister, my said daughter, *Anna Margaretta Jones*, the clear sum of 15l. yearly during her natural life; and in case my said daughter *Judith* shall happen to die, and leave no issue of her body, then I give and devise all and singular the aforesaid premises, with their and every of their appurtenances, to my said daughter *Jones* for her life; and after her decease, then to the child or children of my said daughter *Anna Margaretta Jones*, as shall be then living, charged and chargeable as aforesaid.

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And, for want of such issue, then I give and devise the premises unto my nephew, *Mr. Francis Morton*, and to his heirs and assigns for ever, charged and chargeable as aforesaid; and also paying thereout to his brother, *Mr. John Morton*, the sum of 3l. And I give and bequeath all the arrears of rent which shall happen to be due to me from my tenant at *Callow Hills*, at my death, to my said two daughters; and I further give and bequeath unto my said daughter *Judith Skinner*, her heirs and assigns, all mortgages made to me, in fee or for term of years, and all and singular and other the rest and residue of my goods, chattels, and personal estate whatsoever of what nature or kind soever which I shall be possessed of or any ways entitled unto at the time of my decease, after payment of my debts, legacies, and funeral expences.

The estate at *Pixley*, and the coppice at *Aylton*, mentioned in the said will, are the same as are mentioned in the said settlement of the year 1709. The said testator, *John Morton*, died in 1751, without revoking or altering the said will. The said *Judith*, his eldest daughter, survived her husband, the aforesaid *Wm. Skinner*, and married the Reverend *William*

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Cope Slopston, and died in *December 1784*, without ever having had issue.

The said *Anna Margaretta*, the other daughter of the said *John Morton*, who survived her said father, outlived her said husband *Henry Jones*, and afterwards married *Henry Durbin*, Esq. and died in *October, 1799*, without ever having had issue. *Francis Morton*, the nephew and devisee in remainder in the will of the said *John Morton*, died in *August, 1762*, intestate, and without issue, leaving two brothers, the reverend *John Morton*, of *Red Marley*, and *Wm. Morton*, him surviving. The said *John Morton*, the eldest brother and heir at law of the said *Francis Morton*, died intestate and without issue, in *March, 1789*, leaving the said *William Morton*, his only brother and heir at law, him surviving: the said *William Morton* devised to the lessor of the plaintiff, and died on the 2d day of *May, 1804*; and on the trial, a verdict was found for the plaintiff, subject to the opinion of the court of *King's Bench* upon this Question: WHETHER the reversion in fee, in three undivided fourth parts of the premises in question passed by the will of *John Morton*, the settlor, or descended, upon his death, to his said two then surviving daughters, *Judith* and *Anna Margaretta*.

DAUNCEY, for the plaintiff, in order to shew that the reversion passed by the residuary devise of "all other the testator's freehold and copyhold lands, &c. which he should be entitled unto at the time of his decease, and which were not settled in jointure on his wife," cited *Cook v. Garrard*,* *Lidcot v. Willows*,† *Wheeler v. Waldron*,‡ and other cases. In *Mornington v. Davis*§ it was held that the word *land* signifies not merely the land itself, but the

* 1 *Saunders*, 181. 1 *Ler.* 112,

† 3 *Mod.* 229.

‡ *Allen*, 28.

§ *Post.* 229.

estate also in the lands. In *Hiley v. Hiley*, *contra*,* the testator had no other lands to pass except the reversion, and that case was denied to be law in *Chester v. Chester*;† and in *Strode v. Russell*,‡ a devise of all the testator's lands out of settlement was held to pass the reversion in fee of the lands in settlement.

Lord ELLENBOROUGH, C. J. "Those cases seem clearly to establish that the words *lands out of settlement*, mean the estate not comprised in the settlement which is the language of the case of *Chester v. Chester*."

In *Goodtitle v. Downshire*,§ the principle was not disputed, and it was said that the language of the residuary clause would carry all the interest, whether known or unknown to the testator at the time, provided he did not expressly exclude some part of it; and that the court in construing the words of a residuary clause would have to consider not whether the testator at the time had a particular estate in his contemplation to pass it by such clause, but whether he meant to restrain the effect of the words to exclude what the law would include in them. In *Freeman v. the Duke of Chandos*,|| where the words *all estates wheresoever* were held to pass a reversion, Lord Mansfield said that as the testator was seised of the reversion, and could devise it by his will, it was only necessary to shew that he used words which would pass it. Now here it appears from the use of the words, '*which are not settled in jointure*,' that he knew he had a power of disposing of

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DOWNSHIRE
v. MANSFIELD

* 3 Mod. 229. Vern. 560.

† 3 P. W. 63.

‡ 2 Vern. 624.

§ 2 Bos. and Pul. 600.

|| Cowp. 363.

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 GOODTITLE
 d. DANIEL
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the reversion ; and the same is obvious from the exception of the coppice."

LAWRENCE, J. " In the coppice he had more than a reversion ; he had that in possession."

DAUNCEY. " But he excepts it with reference to the reversion. And as it appears that all the rest was disposed of, there was nothing but this reversion which could pass by the residuary clause. From the situation of his family, he had no reason to think that any of his daughters would have a family ; he expected there would be no grandchild to whom the estate would go, he therefore disposed of it to his brother's son, still giving to his daughters the estate in these premises. As to any argument which may be urged from the exception of the coppice, that circumstance will not go to exclude the reversion from this clause ; and an exception shall not go to make void the whole grant, as if one has only one close in B. and he devises all his lands in B. except that close by name, the exception will be void. As to the words *charged and chargeable*, it may be said that the charges on it, as referable to this reversion, could not apply ; because the charge for the life of Mrs. Jones must cease before this reversion could vest in possession ; but there is at least one charge of 20l. per annum on the estate at *Cleasop* in perpetuity, and *reddendo singula singulis*, this difficulty may be cleared up. By the residuary devise of the personalty, as well as from the whole will, it is clear that the testator intended to dispose, by his will, of all that he had in the world ; he had given away the particular estates by name, and he had nothing to dispose of by the residuary clause excepting this reversion. He therefore concluded that the *plaintiff* was entitled to recover the estate in question.

ABBOTT, *contra*. " The exception applies not merely to the estate which was in settlement, but to the whole

of the lands comprised in the deed of settlement, and all the estate which the testator had therein, and this would be the understanding of every unlettered person upon reading the will. Otherwise the words *not settled in jointure on my wife* must have no meaning, for if they are not wholly insensible, it is difficult to shew that the testator intended the reversion in those lands to pass. The late case does not effect this construction, for that was determined upon the general effect of the will, but here is apparent reason for the exclusion of the reversion from this residuary clause. It is not necessary to give a particular answer to all the cases which have been cited except to those which contain words of exclusion; and it will be found that all of them differ from this, as well in the expressions of the will as in the subject matter of the devise, and the objects for which the devise is given. *Cook v. Gerrard* is easily distinguishable, and it was obviously the intention of the testator that the reversion should pass in order to keep the estate in the family. And in *Strode, v. Lady Russell** there are circumstances which plainly shew an intention to pass the reversion. *Glover v. Spendlove*,† is also distinguishable from this. In all these cases, the word *hereditaments* is used; in the report of the latter case, in *Brown's Reports*, that word is omitted; but in the copy of the will in the register's book there is the word *hereditaments*, which was referable to the estate; here all the words are referable to the land as a description, and not to the estate, except only the word *tenements*, which is equally applicable to a description of the land. He also uses the expression, 'which I shall be entitled unto at the time of my decease,' from whence it is clear that he intended to pass only such property as he could convey a beneficial interest in at the time of his decease. These words

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* 2 Vern. 625.

† 4 Bro. 337.

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also are not, as in the former cases, merely the estate not in settlement, but which were not settled in jointure upon my late dear wife, and the reversion was expectant upon an estate-tail to the daughters, whereas in the other cases there was only an estate for life. And at the time of this testator's decease, as there would be two persons in esse to take this estate, namely, the two daughters, and they might bar the reversion by suffering a recovery, it would be absolutely worth nothing, and the charges upon it would be perfectly absurd, for the estate could never become a fund for the payment of them until the charges themselves ceased; and the devise to the daughter is equally absurd, because as he could only devise the reversion, it would be a devise of an estate-tail, which would never vest till the devisee and the heirs of her body were all dead. Although, therefore, the words would be sufficient to comprise this reversion, yet as it is plainly the testator's intent that it should not; and, if it had been the daughter could have defeated that intent altogether; it must descend upon the two daughters as coheirresses at law, and the plaintiff is not entitled to recover."

DAUMCET, in reply. "It is not necessary to contend that these words have no meaning, on the contrary they are explanatory of the devise, and amount to this: 'I do not mean to devise the estate which is in settlement, because over that I have no power, but all that I can give I mean to devise.' As to the absurdity of the charge, as referable to this reversion; this is not the only estate mentioned, and the charge must be referred to that which it is capable of being applied to. And the objection as to the power of barring the devise; would be applicable to every devise of an estate-tail after an estate-tail."

The court took some time to consider of the judgment, which was this day delivered to the following effect, by

Lord ELLENBOROUGH, C. J. After stating the case:

“ The question reserved in this case rests on this consideration, whether sufficient appears upon the face of the will to shew that it was the intention of the testator, that the general words of this residuary devise should not extend to the reversion of the estate settled on his marriage; for if these words are not restrained, they, of course, carry the reversion, and on the other hand if they are restrained, so as to exclude the whole of the lands and not merely the estate in settlement, by the words of exception used, it is clear they do not pass the reversion. The expression, ‘ and which are not settled in jointure on my late dear wife’ are the words which are relied upon by the *defendant*, as controuling the generality of the previous words, and we think in this case they have that effect. On comparing the provisions in the will with those of the settlement, the testator’s intention may be the more readily discoverable. By the settlement, the lands in question were settled on himself, the testator, for life; remainder to his wife for life; remainder to the heirs of the body of himself and wife; with the remainder in fee to his own right heirs for ever. At the time of making his will, his wife was dead, and he had only two daughters alive, who under the settlement had an estate-tail expectant upon his decease. Under these circumstances, the testator had no interest in these settled lands to be the object of the disposition under his will, but subject to this remainder in tail; nor had he any which his will could operate upon, until both his daughters died without issue. Therefore, if the object of the testator, by this devise, was to pass any interest which should take effect during his daughters’ lives, it would be impossible; and the testator could hardly have made a will which in the particular case which he has mentioned, he knew could have no effect. He intended clearly to give his daughter *Judith* an estate-tail; but such an estate he could not carve out of the reversion, for so long as she

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lived she must have had a prior estate to prevent it from taking effect, and when that impossibility of passing under the will ceased, as to this estate, she and all those who were to take under this devise would be extinct, inasmuch as the devise to his daughter *Judith* would be a devise in tail general of that estate which she had already under the settlement. The devise to *Anna Margarett Jones* would be an estate for life, remainder for lives to her children living at her decease, to vest only after the death of herself and all her children. That the testator recognized the settlement at the time of his will is clear, and it is impossible to suppose that he could have intended what is now contended for the lessor of the *plaintiff*, for it would amount to this, that intending to devise the reversion, he would make previous limitations of it, which could not take place. He had by his will given an estate-tail, and therefore could not be ignorant of such an estate. But it is said that if this is excluded from the residuary clause, and this reversion does not pass by the will, there is nothing on which this general clause can operate, for he had divided all the rest of his estate amongst the objects of his bounty; but it does not appear whether he had or had not. If he had not even, it is more probable that he should have intended to introduce these words out of caution to comprehend such estates, not expressly mentioned, as he thought he might have omitted, than to suppose that the land in the settlement should be the subject of a devise like this which is wholly inconsistent with the nature of it. He might suppose, as he mentions copyhold and leasehold lands, that it might apply to such lands if he should have any at his decease, or if neither of them, that it might take in those things which he had not properly devised before. In the case in 2 Bos. and Pal. 619, 612. one of the reasons given for the construction there made of the will in that case, is the absurdity to follow

from the contrary interpretation ; and this argument in the present case is so conclusive as to make it unnecessary to seek any confirmation from the exception of the coppice at *Aylton*, which he directs should always go and be held with his estate at *Pixley* in the same manner as that estate is settled ; but it may be observed that the argument on the intention of the testator not to die intestate is not well founded, for the effect of this exception as to the coppice at *Aylton* is to make his daughters tenants in tail of that, and to leave the reversion to go to his right heirs, as would be the case as to the lands included in the settlement. It is not necessary to go into the cases, because the general doctrine is not in dispute. Supposing the words to be insufficient of themselves to exclude the reversion, yet taking at the same time into consideration the limitations in the settlement, the words in the will referring to the settlement, must be taken as restrictive of the operation of the former general words ; and it is merely a question of intention. It may be observed also that this case differs from all those which have been cited, except that of *Glover v. Spendlove*. In all the other cases, the words were more descriptive of the residuary interest in the deviser which he had power to dispose of. In this case the words ‘ and which are not settled in jointure on my late dear wife,’ are not properly descriptive of the reversion, but of the subject of the settlement, and there seems ground therefore to suppose that they are intended to be descriptive of the lands rather than of the interest of the testator. To have made this more like the case of *Glover v. Spendlove*, it should have been ‘ not settled in jointure on my late wife and her children.’ It is not necessary to say more, than that, upon the fair effect of the words, independently of the other circumstances of the case, the intention of the testator was not to include this estate in his residuary devise.”

JUDGMENT for the DEFENDANT,

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1803.

SIFFKIN
VERSUS
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SIFFKIN and FEIZE assignees of Robert Brown, bankrupt, against WRAY.—May 17.

A. a bankrupt by B. his agent, purchases corn abroad, and assigns to such agent a credit on C. a merchant abroad, and also on D. a merchant in London, allowing B. a commission. C. shipped corn for A. and took bills on A. B. and D. severally for aliquot parts of the amount, according to the order of A.; and also shipped other corn, and drew other bills, and sent the documents to B. In the bills of lading C appeared to be the shipper. B. transmitted their bills of lading unindorsed to A. and debited him with the amount of the bills drawn. The bills drawn by C. were dishonoured. A. committed an act of bankruptcy and then received the bills of lading &c. and agreed to give up the corn, &c. to E. the general agent of B. in London. Held, that E. could not retain it as against the assignees of A.

THIS was an action of *trover*, for a quantity of wheat, to which the *defendant* pleaded the general issue. At the trial of this cause before Lord ELLENBOROUGH, at the sitting after *Trinity term*, 1804, a verdict was found for the *plaintiff*, for the sum of 843*l.* 3*s.* 7*d.* subject to the opinion of the court, on the following case.

Robert Brown, the bankrupt, committed an act of bankruptcy on the 2d of *September*, 1801, upon which a commission, dated the 5th of *October* following, was issued, and he was, afterwards, duly declared a bankrupt, and the *plaintiffs* were chosen his assignees, and an assignment was duly executed to them by the commissioners. The bankrupt for some time antecedent to the month of *September*, 1801, carried on the business of a merchant in the city of *London*, by importing corn and other merchandize from *Dantzic* and other places on the continent.

John Deiderick Fritzing, of *Hamburgh*, was the agent of the bankrupt there, and the person upon whom the bankrupt occasionally assigned a credit with *Dubois and Co.* of *Dantzic*, for merchandize purchas-

ed by them, for him on the continent, allowing him the usual mercantile commission upon such transactions as passed through his hands.

Messrs. *Robert and John Wilson*, of the city of *London*, were the corn-factors of the bankrupt, and he, on ordering purchases of corn, frequently assigned a credit on them. In the month of *July*, 1801, the bankrupt gave an order to *Dubois and Co.* to ship for him 200 lasts of wheat, in addition to 200, then already ordered and shipped, and to value for the same in the usual way, viz. one-third on the bankrupt, one-third on *Fritzing*, and one-third on *Wilsons*, or, if more convenient, to *Dubois and Co.* one-half on the bankrupt, and one-half on *Fritzing*, and to forward the shipping documents to the bankrupt through *Fritzing*. In pursuance of this order, Messrs. *Dubois and Co.* did procure 102 lasts of wheat, and no more on the account and risk of the bankrupt, and shortly afterwards, shipped at *Dantzic* 74 lasts thereof, per the *Aurora*, 18 lasts per the *Die Frohe Gesellschaft*, and 100 lasts per the *Duchess* in part of the 200 lasts so ordered, as fresh purchases; and on the 18th of *August*, 1801, they wrote a letter to the bankrupt advising him of their having so done, and having in consequence drawn the after mentioned bills on *Fritzing* and Messrs. *Wilsons* respectively, and having forwarded the ship documents of the two last mentioned shipments to *Fritzing*, to the further disposition of the bankrupt.

On account of these fresh purchases, Messrs. *Dubois and Co.* on the 14th of *August* 1801, drew bills of exchange on the bankrupt, to the amount of 1000*l.* sterling, which he accepted, but did not pay. On the 18th of *August*, they drew a bill on Messrs. *Robert and John Wilson*, for 10666:20 *Dantzic money*, equal to 500*l.* sterling money, which last mentioned bill was not accepted; and they, on the same day, drew bills on Mr.

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Fritzing, for 23982:4 *Dantzic* money, equal to 4,908l. 8, *Hamburgh* money, in sterling, 1136l. 4s. 5d. which were accepted. The invoice price of the wheat, per the two ships *Die Froke*, *Gesellschafts* and *Duchess*, was 1400l. sterling or thereabouts, the parcel of wheat per the *Aurora* was stopped in *transitu*, by *Dubois* and Co. On the same 18th of *August*, 1801, *Dubois* and Co. transmitted to *Fritzing* the last mentioned letter of that date, written to the bankrupt, two bills of lading indorsed in blank of the two parcels of wheat per the *Gesellschaft* and *Duchess*, in a German letter of which the following is a translation :

Dantzic, 18th of August, 1801.

MR. JOHN DEID. FRITZING, AT HAMBRO'.

"Sir, In answer to your two most esteemed favours of the 21st and 28th ult. which we duly received, we pass the same thereof in silence, as we agree we have laden for account for our mutual friend, Mr. Robert Brown of London, 18 lasts of wheat, in 367 sacks, and seven deckers of matts, on board the *Konigsberg* ship, called the *Froke Gesellschaft*, whereof *Martin Ridder* is master; 10 lasts of ditto, in 200 sacks and three *Deckers* of matts, on board the ship *Duchess* of *Barkley*, whereof *James Barr*, is master; and whereof you will find inventories, and bills of lading here inclosed at your service, against which, however, we request you will be pleased, promptly upon presentation, to honour our drafts of this day for B^e. R^t. 1000 a 10 a—D. Order, I. T. and A. I. Mallhey & Co.

600	do.	} Elliot and Co,
400	do.	
1000	do.	Geo. Jennings and Co.
1000	do.	Frantz Gottenburg and Co.
200		do. Johann Grass Widan and Son.
108	8	do. Cornelius Van Almond & Co.
Total		
B ^e .	4308 8	

And to account respecting the same with our said friend in London. DUBOIS AND CO."

The bills of lading are in the usual form, both describing that *Du Bois* and Co. were the shippers, and

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that the wheat *per* the *Gesellschaft* was to be delivered to Messrs. *J. H. Dubois* and Co. or order, and the wheat, *per* the *Duchess*, unto order or assigns. Mr. *Fritzing* wrote a letter on the 25th of *August*; 1801; to Mr. *Brown*, of which the following is an extract: "Inclosed I transmit your letter from Messrs. *Dubois* and Co. Messrs. *Dubois* and Co. inform me that the bill of lading of 18 lasts of wheat in 367 bags, D. and seven bundles of matts, *per* the *Froke Gesellschaft*, Captain *Martin Ridder*, and of the parcel of wheat *per* the *Duchess* Captain *James Barr*, from *Burckley*, shall be forwarded next post, as the captain had not sent them before departure of the mail. I now debit your account for *Banco* for 4308,8. in *Dubois* and Co. drafts, the 18th of *August*, ten weeks date, which are under acceptance and of which please make due notice." Mr. *Fritzing*, in a letter of the 28th of *August*, 1801, transmitted to the bankrupt the two bills of lading, without indorsing them, and also the letter from *Dubois* and Co. to the bankrupt of the 18th *August*, 1801, and which corresponded with the statement in *Fritzing's* letter to *Brown* of the 25th of that month. The bankrupt received Mr. *Fritzing's* letter, the bills of lading, and *Dubois's* letter on the 7th of *September* 1801, being five days after an act of bankruptcy committed by him. The *Froke Gesellschaft* arrived in the port of *London* on the 28th *September*, 1801, and the *Duchess* on the 2d *October* following. The bills so drawn by *Dubois* and Co. on the bankrupt for 1000l. sterling; on *I. and R. Wilson* for 500l. and on *Fritzing* for 4308,8 *banco*, were dishonoured, and returned to *Dubois* and Co. and *Dubois* and Co. have retired or taken up the whole of them. The defendant was the general agent in this kingdom of Mr. *Fritzing*; and the bankrupt on the 7th *September*, 1801, delivered to the defendant the bills of lading of the two parcels of wheat *per* the *Die Gesellschaft* and *Duchess*, on his giving an

1805.

SIR JOHN
GUTHRIE
W. RAY.

undertaking in writing, of which the following is a copy.

“ MR. ROBERT BROWNE, LONDON.

“ Dear Sir, I hereby acknowledge to have received bills from you—two bills of lading, viz. 10 lasts of wheat, in 200 bags per the ship *Duchess*, Captain *James Barr*, 18 lasts of wheat in 367 bags per *Die Froke Gesellschaft*, Captain *Martin Ridder*, shipped by *Dubois and Co.* in *Dantzic*, which I will receive on arrival, and dispose of to the best advantage; the nett proceeds of which two parcels of wheat shall be exclusively applied to the discharge of such bills as have been drawn against them.

A. WRAY.”

The *defendant* obtained the possession of the wheat, and sold the same; the nett proceeds whereof amounted to the sum of 843l. 3s. 7d. which the *defendant* has paid into the bank in the name of the accountant general in a cause in *Chancery*, to which the *plaintiffs* and *defendant* in this cause, and *Dubois* with the curators of *Fritzing's estate* are respectively parties, to abide the verdict in this cause, and the Lord Chancellor's decree thereon. This action was commenced the 6th of *February*, 1802. On the 19th of *March*, 1802, Messrs. *Dubois and Co.* did by letter approve of the above named *defendant* having obtained the possession of the two bills of lading, per the *Duchess* and *Gesellschaft*, and also of the wheat, which is the subject of this action, and did claim the proceeds arising from the sale of the wheat.

John Deiderick Fritzing has become a bankrupt according to the laws and regulations of the City of *Hamburgh*; and *Joseph Pitcairn* and *John Henry Ludendorff* of *Hamburgh*, merchants, have been appointed his assignees or curators; and, as such curators, claim the proceeds of the said two parcels of wheat.

The bankrupt, at and from the time of shipping the two parcels of wheat was and now is indebted, both to *Dubois and Co.* and to *Fritzing*, in a greater sum of

money than the invoice price of the wheat. The question for the opinion of the Court is, whether the *plaintiffs* are entitled to recover; if the court should be of opinion that they are entitled to recover, the verdict to stand; if not, then a verdict to be entered for the *defendant*.

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SCARLETT, for the *plaintiff*. " This case differs from that of *Atkins v. Barwick*,* inasmuch as in that case the goods were returned by the bankrupt before the act of bankruptcy, and in fact were never actually received by him; for before he became a bankrupt he waved the acceptance of them. That case only tends to decide that where a man finds himself unable to pay for goods, he may renounce the acceptance of them; but when he becomes a bankrupt, he cannot part with them. Nor could he detain them for the benefit of any other person. Here the only persons who could claim the goods were the assignees in right of the bankrupt, and the person who was at liberty to stop them *in transitu*. But as *Fritzing* himself could not have stopped the goods, so neither could his agent: *Fritzing* was only the agent of the bankrupt, and there is no case where one who is merely agent for the bankrupt can be entitled to stop *in transitu*. In *Cox v. Harden*,† the person who stopped was considered in the place of the original purchaser, and was a consignor. *Wray*, the *defendant*, can only receive them for those who are entitled, or as a mere volunteer."

MARRYAT, *contra*, endeavoured first to consider it as a stoppage *in transitu* by *Wray*; and then, if the right of stoppage *in transitu* was confined only to the consignor, he contended that *Fritzing* was the same as a consignor.

Lord ELLENBOROUGH. C. J. said " If you are to

* 1 *Strange*, 165. 4 *Burr*. 2239.

† *Smith's Reports*, M. 44 *Geo. III.*

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go into the consideration of the cases in equity, can you shew any case in which an agent for the shipper can stop *in transitu* for the purpose of taking up securities.

And afterwards, THE COURT held that there was no stoppage *in transitu*, nor any agreement for it in the course of the dealing between the parties; but that the goods were given up by the bankrupt upon a compromise between him and the *defendant* as the agent of the parties, after the bankruptcy.

POSTEA to the *defendant*.

McFADZEN against OLLIVANT.—May 17.

An action for criminal conversation with the wife of the plaintiff & an action upon the case, and the proper plea is not guilty within six years.

McFADZEN
versus
OLLIVANT.

THE *plaintiff* declared in the usual form against the *defendant* for assault on and criminal conversation with his wife, to which the *defendant* pleaded *not guilty*, and, also, the statute of limitations *actionem non*, because the *defendant* was not guilty within six years. To this the *plaintiff* demurred, and there was a joinder in demurrer.

Woon, for the *plaintiff*. "This case is not within the statute of limitations, or if it is, the proper plea is *actio non accrevit* instead of *not guilty*, within six years. This is a peculiar action of *trespass* founded on the consequential damages to the husband. The words of the statute are, "all actions of *trespass quare clausum fregit*, all actions of *trespass*, &c. all actions of account, and upon the case;—and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced within the time of limitation hereafter expressed, that is to say, the said actions upon the case, other than for slander, and the said ac-

tions of account, and the said actions for *trespass*, debt, detinue and replevin, for goods or cattle, and the said action of *trespass, quare clausum fregit*, within six years next after the cause of such action.' These words *trespass* for goods, or cattle, and *trespass quare clausum fregit*, therefore, do not include the present case.— Then follows another clause, limiting the said actions of *trespass*, of *assault* and *battery*, *wounding*, or *imprisonment*, or any of them, within four years next after the cause of action accrued." 21 Jac. 1. c. 16. § 3.

And he endeavoured to shew from the cases of *Batchellor v. Bigg*,* *Browne v. Gibbons*,† and *Milburn v. Reade*,‡ that this was not an action of trespass and assault.

SCARLETT, *contra*, was stopped by the court,

Lord ELLENBOROUGH, C. J. "It strikes me that the action accrues the moment the adultery is committed, whether the husband knows of the stupration of his wife or not; for it would be strange to say in this case that he who loses that, not knowing what he's lost, has suffered no loss at all; and the case of *Sayer v. Cooke*§ is express to that point. As to the last objection, it cannot apply. The next question is, whether it is an action on the case, or an action of assault. An action of assault, it is said, must be an action of assault on the person, and would survive to the wife; but here is nothing in the action of that kind: the gist of it is the consequential injury to the husband alone, and there are cases in which it has been decided to be an action upon the case, and it must fall therefore within the first clause. If indeed the question were nicely bal-

1806.

McFADDEN
VERDICT
O'LEARY

* 2 Black. 854. 3 Wils. 319.

† 1 Salk. 206.

‡ 3 Wilson, 314. see also 2 Barnardiston, 108,

§ 2 Wils. 85. 2 Burr. 753.

1806,

M. FARRER.

SOLICITOR

GREGORY.

anced, as to whether the limitation should be within six years or four years, then, this being only a general demurrer, the plea would be good. I do not know what might have been my opinion on the case, formerly, if it had not been decided that this is an action upon the case; but as it has been determined and upon argument, I do not think it necessary to disturb the decisions, and I remember pleading the statute of limitations myself in bar to an action for adultery where it was successful, though I will not now revive the memory of an unfortunate case by mentioning the name. But whether six or four years, the bar here applies, for if he was not guilty within six years, it is clear he could not be guilty within four years."

LAWRENCE, J. "It would be going a great deal too far to say that this is an action to which there can be no limitation; for after a length of time there might be no means of defence to the *defendant*, and a conspiracy might be carried on against him most successfully by the husband and wife. On the question whether the limitation is within *six* or *four* years, I have a note of the late Mr. Justice BULLER upon the paper books, in a case which occurred in this court, *Parker v. Ironsides*, which appears decisive. The declaration was for debauching the daughter of the *plaintiff*, *inter divers* days and times, and the case is indorsed "Good, for this is an action upon the case; *aliter* if it had been an action of trespass." And within the book is this memorandum: "This is an action upon the case, and not of trespass, therefore *divers days* is proper, and the proper plea on the statute of limitations is *not* guilty within *six* years, and leave was given to withdraw the demurrer upon the payment of costs." The action of assault and battery for an assault on the wife is very distinct from this action; for there the husband is only named for conformity; the injury is done to the wife, and the action will survive to her: but in this

case there can be no survivor to the wife, because she has no injury to complain of, the action necessarily implying the consent."

1805.
M'FADDEN
versus
O'BRIEN,
et al.

LE BLANC, J. " This must be considered either as an action on the case or of trespass, and I think we are labouring a very peculiar distinction indeed, to say that it is not an action upon the case, nor an action of trespass which falls within the express words of the act of parliament.

LEAVE TO AMEND GIVEN TO THE PLAINTIFF.

RYTON against BEATTIE.—May 27.

Where the plaintiff has taken an assignment of, and instituted proceedings on the bail bond, he is prevented from proceeding in the original action. If, therefore, the bail being fixed, and such proceedings being had, the defendant upon having put in bail above, applies to stay proceedings upon the bail-bond on payment of costs, and before the expiration of the rule nisi the plaintiff has lost a trial, he is entitled to have the bail-bond stand as a security: for the rule nisi is a further stay of proceedings and the loss of a trial was not occasioned by his laches.

RYTON
versus
BEATTIE.

THIS was a rule to shew cause why the proceedings upon the bail-bond should not be stayed, upon payment of costs. The state of the proceedings was as follows:—The defendant was arrested on a latitat, returnable on Wednesday next after 15 days of Easter, being the 1st of May, 1805. The plaintiff, took an assignment on the bail-bond, on the first day of May, and sued out writs against the defendant and his bail. The defendant put in bail upon the 7th in the evening, and notice thereof was served on the plaintiff's attorney. The next day being the 8th of May the defendant surrendered in discharge of his bail.* Notice of render was

* Thus far appears on the affidavit of the plaintiff's attorney; the rest of the statement is taken from the notes of Mr. LAWSON his brief.

1855.

WYLLIE
 versus
 BEATTIE.

served on the *plaintiff's* attorney on the 9th, and the rule nisi was obtained on the 11th to shew cause in four days which would be on the 15th.

LAWES, for the *plaintiff* now shewed cause, and contended that as the *plaintiff* had lost a trial, he was entitled to retain the security of the bail-bond, although the proceedings should be set aside upon payment of costs. That having obtained an assignment of the bail-bond, he could not proceed in the original action immediately upon the notice of render, and could not go to trial at the last sittings within the term; much less could he proceed after the rule nisi obtained, which operated as a stay of proceedings until the 15th or the 16th.

ESPINASSE, *contra*, "If the *plaintiff* is entitled to have the bail-bond stand as a security in this case, it must invariably happen that every *plaintiff* will be entitled to it, upon a writ returnable on the first return of *Easter term*, but, in fact, if the *plaintiff* has lost a trial within the term, he has done so by his own negligence, for he might have proceeded in the original action immediately upon the render, as the original action, and the action upon the bail-bond are two distinct and independant suits and causes of action. The *plaintiff* is therefore not entitled to have the bail-bond stand as a security.

LAWES, *in reply*. "When the *plaintiff* has taken an assignment of the bail-bond, he can no longer proceed in the original action, while he retains his right to sue on the bail-bond. Upon the notice of render, therefore, he could not proceed against the *defendant* in the original cause, without discontinuing or giving up his costs in the action against the bail and the *defendant* upon the bail-bond; which he could not be required to do as he is entitled in that action to recover the amount of the damages which he would have ob-

tained upon a verdict in the original action. When afterwards the rule *nisi* was served that, operated as a further stay of proceedings until the expiration of that rule. No *laches* is, therefore, imputable to the *plaintiff*; and as a trial has been lost he is entitled to have the bail-bond remain as a security."

The COURT held that, as the *defendant* had delayed putting in bail in the early part of the term; so that the *plaintiff* obtained an assignment of the bail-bond, after which he could not proceed in the original suit, until a period when, if he had proceeded, he would have lost a trial, he was entitled to have the bail-bond stand as a security.

LAWRENCE, J. had some difficulty, and observed, that "though he thought there was good reason for imposing these terms where the delay and loss of a trial arose entirely from the conduct of the *defendant*; yet he did not see the same reason for it when the *plaintiff* might have proceeded, had it not been for the other actions which he himself had commenced upon the bail-bond. That if indeed bail were to be fixed in this way, he thought it would become very difficult to procure bail."

LE BLANC, J. upon this observed, that "at the time when the *plaintiff* took his assignment and commenced his actions upon the bail-bond he was perfectly regular, and could not know whether the *defendant* would put in bail above or not; that therefore, he did not feel disposed to break in upon the established rules of the court; and the *plaintiff* having lost a trial must have the bail-bond stand as a security.

RULE ABSOLUTE, the bail-bond standing as a security.

1805.
EYTON
VERSUS
BATTIE.

1801.

LE MESURIER and another against VAUGHAN.—

May 17.

Goods being shipped on board an American ship the President, a policy was effected by mistake, calling it the good ship called the American ship President; or by whatever other name the said ship is or shall be called: Held, that the plaintiff was entitled to recover under the general auxiliary words, there being no fraud, although it was the intention of the plaintiff to have stated the ship to be an American, and by the form of the policy there was no warranty that the ship was an American.

LE MESURIER
VERSUS
VAUGHAN.

THIS was an action upon the case on a policy of insurance, dated the second day of March, 1801, at and from New York to Gibraltar, on goods on board of the good ship or vessel called the *American ship President*, whereof was master, under God, for that voyage, or whosoever else should go for master in the said ship, or by whatever other name or names the same ship, or the master thereof, was or should be named or called. The declaration, which it is agreed may, if necessary, be referred to as part of the case, after stating the policy, averred, that the *defendant* became an assurer in the sum of 300*l.* on goods on board of the ship mentioned in the policy, and subscribed the policy as such assurer. A large quantity of goods was loaded and put on board of the said ship at New York, to be carried from thence upon the said voyage; and, in the course of the voyage, the said ship, with the said goods, was lost by capture. The *defendant* paid the premium into court upon the money count, and pleaded the *general issue*; and, at the trial of the cause, before the Right Honourable Lord ELENBOROUGH, at the sittings at Guildhall, after last Michaelmas term, a verdict was found for the *plaintiffs* for 268*l.* 10*s.* Od. subject to the opinion of the court upon the following case:

The *plaintiff* effected the policy in question upon flour on account of the commissioners for victualling his majesty's navy; and the *plaintiff's* clerk was directed

to designate her as an *American*. That the invoice according to which the insurance was directed to be made, was intitled as follows :

1806.
Ex MESSERS
JAMES
VAUGHAN.

" New York, 14th February, 1806."

" Invoice of 2906 whole and 250 half barrels, superfine flour of New York, loaded on board the *American* ship, called the *President*, of New Bedford, Andrew Pinkman, master, bound from hence to Gibraltar, and there consigned to John Sweetland, Esq."

In consequence of these directions, he effected the policy in question. The goods insured were shipped on board the ship called the *President*, mentioned in the invoice, and which was an *American* ship. The said ship *President* sailed with the goods which were the subject of the insurance on board, upon the voyage described in the policy, and was captured, with the goods on board, in the course of the voyage and before her arrival at Gibraltar. It was insisted upon the part of the *defendant*, that this evidence did not support the declaration, and therefore that the *plaintiffs* ought to be nonsuited.

The *Chief Justice* directed a verdict to be found for the *plaintiffs*, reserving a case for the opinion of the court, whether the *plaintiffs* ought, under the circumstances, to be nonsuited ; if not, the verdict to stand.

GILES for the *plaintiffs*, contended that they were entitled to recover upon this policy, notwithstanding there was a mistake in the name of the ship ; the flour having been shipped on board the *American* ship *President*, and the policy being in terms on any ship, by whatever name or names it may be called : and the court called upon

WARREN, I. W. *contra*, who contended that the name of the ship being set out, the good ship called the *American* ship, *President*, the addition of the words by

1803.
 L. E. MESSENGER
 VERSUS
 VAUGHAN,

whatever other name it should be called, would not help the *defendant*, and there being in fact no such ship lost, and no goods of the *plaintiffs* being put on board any such ship, the *plaintiffs* could not recover. That though it was stated to be the intention of the assured to load the goods on board the ship *President*; yet as that did not appear to have been communicated to the *underwriters*, they could not be affected by it. If it had been communicated, it might even have had the operation of a fraud upon them; for there would have resulted from it a promise to insert in the policy a warranty that the goods should be shipped on board an *American*, whereas this was styled only a designation of the country of the ship, and did not amount to a warranty. That if it were allowed, it would convert every insurance into a general insurance upon any ship and ships; for the party might insert an imaginary or false name of a ship, instead of paying the higher premium upon an insurance on ship and ships, and yet be permitted to recover. That it was clear that if the insurance was made upon another ship than the goods were intended to be sent by, the policy would be void; and so it should be, if the name were wholly fictitious, since the same frauds might be committed in each case.

LORD ELLENBOROUGH, C. J. " If there was any *deceit*, then there is no question but the policy could not stand. Certainly the description of the thing and ship insured should be observed to the extent, now ordinarily required, as it is necessary to be specified in the terms of the policy; but the parties contemplating at the time that they might have made a mistake, add these words, 'by whatever name or names the ship is or shall be called.' It is said, indeed, that if we do not hold the parties to a precise nomination of the ship, there might be some fraud committed on the *underwriters*. Whenever such a case occurs, we shall look with very sharp eyes to vacate the policy. Here, how-

ever; it is evidently a mistake; as appears from the description in the invoice. How is the insurer prejudiced? It is said he would have been entitled to a warranty. If so he should have had it expressed on the policy. But if there is no warranty, then he has made no exception of the risk, and we cannot omit to give effect to these words."

1805.
LA. MARYLAND
V. VANCE.

LAWRENCE, J. "Had this case stood wholly without an authority, I should have been of the same opinion; for I do not see how the underwriter could have been prejudiced, if there is no ship of the name of the ship mentioned in the policy; and if there was to have been a warranty, I do not see why the underwriters should not be more upon their guard to have their engagements properly expressed. In a case which occurred in 1744, *Hall v. Moneyless*, which was an insurance upon the ship called the *Leopard*, by mistake called the *Lenard*, and where there were the usual supplementary words as here, it was insisted by the *defendant's* counsel that they should apply only to a vessel called by some other name as well; but, notwithstanding, the *plaintiff* had judgment. I am glad, therefore, that even upon so plain a subject, our opinion is supported by authority."*

POSTEA TO THE PLAINTIFF.

DOR on the dem. of TOONE and another against COPESTAKE and BRUNETT.— May 14th.

A. devises land to trustees to raise money by sale or otherwise, and to pay certain legacies; and wills the overplus or reversion thereof to be applied by them and the officiating ministers of the congregation or assembly of people called methodists, that do and shall actually assemble at L. shall from time to time think fit, to apply the same

* His lordship cited this, I believe, from a MS. note. The present case was on before, when it was held that the words do not amount to a warranty.

1805:
 Dec. dem.
 Toorn
 versus
 Capestake.

And directs that unless two or more trustees die, the survivors shall nominate others: Hold, the legal estate is in the trustees, and a court of law will not inquire into the trust, which may be to charitable uses or otherwise, and is not void at law within the stat. 9 Geo. II. c. 36, s. 1.

THIS was an action of *ejectment* to recover certain premises within the parish of *Foleshill*, within the county of the city of *Coventry*, and tried at the last summer assizes for *Coventry*; when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case. *Thomas Faulkner*, of *Foleshill*, in the county of the city of *Coventry*, being seised in fee of the premises contained in the declaration, by his last will, bearing date the 8th of *July*, 1765, (*inter alia*) gave and devised as follows. "I give and devise to *Hannah*, my loving wife, for and during the term of her natural life, all and singular that my messuage or tenement with the appurtenances, situate, standing, and being at *Alderman's Green*, in *Foleshill*, aforesaid, with all that my close of meadow or pasture land thereunto adjoining, with the rights, members, and appurtenances to the same messuage and close belonging, or in any wise appertaining. *Item*, from and immediately after my said wife's decease, I will and devise all and singular the said messuage or tenements, close and premises, with the appurtenances, to *George Toorn*, *Francis West*, *Richard Jackson*, and *William Newton*, the survivors or survivor of them and their respective heirs or successors; in trust, that they the said trustees the survivors or survivor of them, their respective heirs or successors, shall justly pay or cause to be paid out of the said real estates the several legacies hereinafter mentioned, at the times and in manner hereinafter appointed, for payment thereof, (that is to say) the sum of 50*l.* of lawful money of *Great Britain*, within the 12 calendar months next after the decease of *Hannah*, my said wife, to such person or persons as they

by her last will and testament, or any other writing or deed, duly executed in the presence of two credible witnesses, shall dispose of the same. Item, also to *William Smith*, late of *Exhall*, but now of *Foleshill*, aforesaid, ribband weaver, the sum of 10l. of like lawful money. Item, to *George Hicklin*, of *Foleshill*, aforesaid, shoemaker, the sum of 5l. of like lawful money. Item, to *William Cantril*, of *Foleshill* aforesaid, ribband weaver, the like sum of 5l. of like lawful money, to be paid them respectively within 12 months next after the decease of my said wife. And to enable the said trustees, the survivors or survivor of them, their respective heirs or successors, to discharge and pay the several and respective legacies or sums of money herein before mentioned; I do hereby will and order that they shall or may sell and dispose of the same messuage or tenement, close and premises, or otherwise charge or mortgage the same, and the overplus or reversion of the said messuage or tenement, close and premises, or real estate, after my said debts and legacies are so discharged as aforesaid, to be applied by them my said trustees, and the officiating ministers of the congregation or assembly of people called methodists, that now usually or that shall for the time being assemble at *Longford*, in *Foleshill* aforesaid, shall from time to time think fit to apply the same. To which end and purpose, I will and devise that when any two or more of my said trustees shall depart this life, the survivors or survivor, shall from time to time nominate or appoint others to fill up the number of the said trustees, as herein nominated. Item, I give all and singular my personal estate of what nature or kind soever, subject to my just debts and legacies as aforesaid, unto *Hannah* my said wife, whom of this my said last will and testament, I nominate, make, and ordain full and sole executrix. The said *Thomas Faulkner* died without altering or revoking his said will, which

1805.

DOE dem.
TEONE
versus
COPESTAKE.

1805.

Don dem.
TOONE
versus
COPSTAKE.

was proved regularly in the Register-court of the Bishop of *Litchfield and Coventry*, in *April*, 1768. The said *Hannah Faulkner* died in or about the year 1791, and *George Toone* and *Francis West*, the lessors of the *plaintiff*, are the devisees named in the said will; *Richard Jackson* and *William Newton*, the other devisees, died before the action was commenced. The debts due from the said testator, and the legacies given under his said will, were satisfied before this action was brought.

The question for the opinion of the court is, whether the *plaintiff* is entitled to recover: if the court shall be of that opinion, the verdict to stand; if not, the verdict to be entered for the *defendant*.

BEST, G. N. was to have argued for the *plaintiff*, but was stopped by

LORD ELLENBOROUGH, C. J. "All you are bound to contend is, that the legal estate is in the trustees until it be divested by a court of equity. We will hear the other side."

VAUGHAN, Serjeant, for the *defendant*. "I admit that the only question is, whether this be a conveyance to charitable uses; for if it be so, it is within the statute 3 Geo. II. c. 36, s. 1, and is void. If this conveyance could stand, it will operate as a virtual repeal of the statute. That act of parliament, as a remedial law, must be construed liberally; and it is most important, in the consideration of this question, to consider the preamble of the act, which states the object of that statute to be to prevent all dispositions whereby property may become unalienable; and if this disposition can stand, it will create a succession of trustees, which will render the property unalienable; for by the will, the surviving trustees, as soon as two die, are to elect others to succeed them, and those, together with the minister at *Longfield*, are to apply the issues in their dis-

creation. If, therefore, this case is within the mischief of the statute, is it not within the remedy? From the persons selected as trustees, is it not evident that the property is to be applied to charitable uses? Undoubtedly it is a charitable use within the restricted sense of the words in the statute."

LORD ELLENBOROUGH, C. J. "By the will it may be for any use either wicked or charitable, for there is no rule to their discretion but their own inclination. Can this be called a charitable use? Is it any more than a mere trust? and if so, go into the other court, which will set all right?" [VAUGHAN said, many things had been held charitable uses in the court of *Chancery* which were not so in the general understanding of a charitable use. Thus an estate left for building of bridges was held a charitable use, for the benefit of the public; and cited *Williams v. Jones*,* and also 3 *Atk.* 806. So 1000*l.* left to the use of the inhabitants of *Chepstow* was held to be a charitable use.] The court held, that this devise was not a charitable use, but a mere trust estate, and that the legal title was in the lessors of the *plaintiff*.

POSTEA to the PLAINTIFF.

JOHN DOE on the demise of GEORGE LEECH against
NATHANIEL MICKLEM.—May 27.

A. after devising lands at *B.* wherein he gives to *F.* and *G.* an estate for life, and also to *D.* an estate for life and to *C.* an estate-tail in remainder, devises unto his lands at *D.* to his sister *E.* for life; or if she should survive *F.* and *G.* so that she should come into the possession of his estate at *B.* then to *H.* for her life; towards the support of *I.* and the said *C.* and after her decease to *C.* and his heirs: Held, that upon the death of *E.* and *H.* the remainder to *C.* in the lands at *D.* vests, notwithstanding *E.* did not survive *F.* and *G.* nor come into possession of the estate at *B.* For, the will may be read according to the intent of the testator, as if it were "to *E.* for

* Amb. 561;

1803.
Doe dem.
TOONE
versus
CORSTAN.

1805,

Don dem.
LEACH
versus
MICKLETH.

life; and after her decease, if she should survive, &c." it being the intent of the testator to provide for C. as well as I. who had a previous estate-tail to C. in the other estate at B. and the testator having professed an intent to devise all his estate, and there being no devise over of the estate at D. after the remainder to C. and his heirs.

THIS was an *ejectment* brought to recover an undivided moiety of an estate, called *Holmers* in the county of *Berks*; and, at the trial thereof, before Mr. Justice *Lawrence*, at the last summer assizes for the said county, the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case:

The lessor of the plaintiff claimed as devisee in remainder under the will of *James King*, and the question arises upon the construction of that will, a copy whereof is annexed. The said *James King* being seised in fee, as well of the premises in question, as also of an estate in his own occupation in *Upton Gray*, *Weston Patrick*, and *Southwarnborough*, mentioned in his will as hereinafter set forth, and of certain other estates, and leaving a wife who is spoken of in his will as a lunatic, duly made and published his will, bearing date the 4th day of *January*, 1766, executed and attested so as to pass freehold estates. The will contains (*inter alia*) the following clause, viz. And as to the estate I occupy in *Upton Gray*, *Weston Patrick*, and *Southwarnborough*, I hereby give, devise, and bequeath to my sister, *Anne Heath*, for her life, she paying 50*l.* a year to the above named *Boyce Free* and *George Green*, for the use of my wife for her life, as is above directed, half yearly; the first twenty five pounds to be paid the first *Lady day* or *Michaelmas*, which shall happen after my death; and likewise to my sister, *Mary Imber*, 20*l.* a year, to be paid her in the same manner by my said sister *Heath*; and if my said two sisters shall survive and outlive my wife, then I hereby order my said sis-

ter *Heath* to pay my sister *Imber* 50*l.* a year in the same manner as I have ordered the 20*l.* a year during my wife's life; and, in case my sister *Imber* shall survive my sister *Heath*, then I hereby give the rents and profits of my said estate to my sister *Imber*, for her life, and after her decease I hereby give the same to my cousin *John King* for his life; and, after his decease, I hereby give the same to my cousin *Thomas Lecch*, the eldest son of my late cousin *Thomas Lecch*, who died at *Mapledorewell*, about two years ago, and the heirs of his body lawfully to be begotten. And for want of such issue, I hereby give the same to his brother *George Lecch* and the heirs of his body lawfully to be begotten; and for want of such issue, I hereby give my said estate to my cousin *James Lecch*, son of my cousin *James Lecch*, who died several years ago, and the heirs of his body lawfully begotten or to be begotten: for want of such issue, to my right heirs for ever. Always remembering, that every possessor of the above estate in *Upton Gray* shall pay out of it 50*l.* a year, as above directed, for the use of my wife during her life. And as to the freehold lands and premises in the parishes of *Bray* and *Blewer*, in the county of *Berks*, called *Holmers* (the estate in question) which came to me on the death of my uncle *Winck* and his family; I hereby give and bequeath to my sister *Imber* for her life; or, if she should survive and outlive my wife and *Sister Heath*, so that she shall come into the possession of my estate at *Upton Gray*, then I hereby give and devise the said estate in *Bray* and *Blewer*, called *Holmers*, to my dear good friend Mrs. *Mary Martha Lena Imber*, widow of my late Nephew *Captain Imber*, for her life, towards the support, education, and maintenance of my above named cousins *Thomas* and *George Lecch*, and, after her decease, I hereby give the same to the said *George Lecch* and his heirs for ever.

1805K

Don deni
Lxxen
versus
Mickland

1808.
 Don dem.
 LEECH
 versus
 MICKLETH.

The testator also appointed the said *Mary Martha Lena Imber*, sole executrix of his will, and residuary legatee of his personal estate.

The lessor of the *plaintiff* is *George Leech* mentioned in the will.

The testator died soon after the date of his will, leaving his wife, his sister *Imber*, his sister *Heath*, his friend *Mrs. Mary Martha Lena Imber*, and his said cousins, *Thomas* and *George Leech*, him surviving. The testator's sister *Imber* died, before his sister *Heath*; and both his said sisters died before the testator's widow: the widow died before the said *Mary Martha Lena Imber*; and the said *Mary Martha Lena Imber* is also dead.

The question for the opinion of the court is, whether the limitation to the lessor of the *plaintiff* took effect: if it did, the verdict is to stand; if not, a *nonsuit* is to be entered.

ABBOTT, for the *plaintiff*, "The question, in this case, is whether the words 'in the devise to his sister *Imber*, or if she should survive and outlive my wife and sister *Heath*, so that she shall come into the possession of my estate at *Upton Gray*, then I give and devise the said estate to *Mrs. M. M. L. Imber* towards the support &c. of *T. and G. Leech*, and after her decease to *George Leech* and his heirs in fee,' make a condition precedent, to the vesting of the remainder to the lessor of the *plaintiff*, or are only a limitation of the times when they shall take place. If they are a condition precedent, then the event did not happen, and the estate could not vest. The *plaintiff* contends that they are not a condition precedent. For the testator did not mean to die intestate as to any part of his estate, or any interest which he had. This appears from the various estates which he had expressly devised to all the members of his family."

Lord ELLENBOROUGH, C. J. "Is it not quite clear by putting the words in a parenthesis?"

And, upon ABBOTT's citing *Moore*, 422, to shew that *or* might be read *and*, his lordship said, "do not all those cases amount only to this, that language is to be construed as it stands in the text. One case is as good as a hundred upon such a subject. I believe all that can be said to any purpose is to be found in a few passages scattered up and down in *Plowden's Commentaries*. The whole doctrine is now under discussion in the House of Lords."*

The case, stood over to give Mr. ABBOTT time to digest his argument so as to avoid going through this whole class of cases; and next day, May 7th, he shortly referred to the following cases: *Taylor v. Taylor*,† *Andrews v. Butler*,‡ *White v. Barber*,§ and *Statham v. Bell*,|| and contended that where words could be construed as a limitation, they would not be construed as a condition precedent. In *Holcroft's* case,¶ he said, *Holcroft* by deed and fine conveyed to the use of his son for life, and after his decease to the first child of his son and the heirs of his body, then to the second, third, and fourth child in like manner, and in default and if the said fourth son should die without heirs of his body, then over. T. H. the younger had only one son, and he died without issue. And as there was no fourth son, the event in terms specified did not happen, upon which the remainder was to vest, yet the court held, that the estate should go over according to the intent; the words making only a limitation of the estate, and not a condition precedent, by whatever mode a preceding limitation is removed the succeeding ones take effect. So here Mrs. *Lena Imber's* estate being

1803.
Dns dem
L. 220
D. 220
M. 220

* His lordship, I presume, alluded to an elaborate argument on a case which has been since decided without affecting that doctrine.

† 1 Atk. 43.

‡ *Willes*, 305.

§ 5 Burr. 2703.

|| *Co. p.* 40.

¶ *Moore*, 486.

1803.

DON dem.
LEITCH
vs
MICKLETH.

removed by her death, the remainder vests in George Leitch, the lessor of the plaintiff.

WILSON, G. *contra*. "The rule as cited from *Holcroft's* case does not apply to the present case; for it only goes to shew that the previous estate must be made void by some means within the view or the terms of the limitation itself. *Jones v. Westcombe and others*,* *Doe d. Fonnereau v. Fonnereau*.† In this case all the devisees having survived the testator, and all of the devises being capable of taking effect as contingent remainders, they cannot take effect as executory devises. *Doe d. Mussel v. Morgan*.‡ The cases in which *or* is construed *and*, do not apply to this case; for they are all cases of construction in favour of children; but there is no case where it has been done to let in a general class of devisees over, not being heirs at law nor persons for whom the testator was bound to provide. He cited *Target v. Gaunt*,§ and *Byas v. Byas*; and *Timewell v. Perkins*,¶ to shew that the intention to settle all his estate does not imply that he means to give it out and out by express terms, and that the implication will still be in favour of the heir at law, who is not to be disinherited but by express words, or implication plain. Here is nothing in the letter of the will, nor which arises from necessary implication, to vest the estate in the lessor of the plaintiff in the event which has happened; for the first life-estate took effect and the tenant for life did not survive the wife and sister *Heath*. In order for him to take this must be wholly omitted as a condition precedent to the vesting of his estate; and if so, *Eana Imber* must have had a vested and not a contingent interest, as well as the lessor of the plaintiff; and the will must be read 'if she, sister Imber, shall die, or if she shall come

* 1 Eq. Ab. 245. 2 Ferm. 17. † Doug. in notis.
‡ 3 Term Rep. 763. § 10 Mod. 402. ¶ 2 Ves. 163.
¶ 2 Atk. 102.

1805.

DOE DEM.
LEACH
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MICKLHAM.

into the possession of *Upton Gray* estate.' Here is no provision made in this devise for the vesting of the estate upon the death of sister *Imber* before she comes to *Upton Gray's* estate, and although the court have sometimes confined a contingency only to the estate to which it was immediately applied, and not permitted it to affect the subsequent estates, as in *Napper v. Saunders*,* and *Tracey v. Lethulier*,† yet that cannot be done in this case." He cited also *Calthorpe v. Gough*,‡ and *Chapman v. Brown*.§

ABBOTT, in reply, said that sister *Imber's* coming into the estate at *Upton Gray*, was not inconsistent with, but only an acceleration of the previous contingency, depending upon her decease.

The case stood over for the consideration of the court, and this day the opinion of the court was delivered to the following effect, by

Lord ELLENBOROUGH, C. J. after stating the case, "The testator has several persons in different degrees of relationship towards him, all of whom are objects of his bounty. He has two sisters, for whom he makes a provision for life out of the estate at *Upton Gray*. He has also two cousins, *Thomas Leech* and *George Leech*, for whom, on the deaths of *Mrs. Heath*, *Mrs. Mary Imber*, and *Mr. John King*, he made provision out of these estates. He made no provision for them during the lives of these persons, for he afterwards desires *Mrs. Lena Imber* to contribute as much as she could out of her life-estate to their support. Having thus attended to their interest during the life of *Mrs. Lena Imber*, he makes further provision for them after the deaths of his sisters. With that view, after he had given to another cousin, an estate for life, in the *Upton Gray* and *Southwambrough* estates, he gives the

* 1 Hutton, 119.

† 3 Atk. 774.

‡ 3 Brown, 394.

§ 6 Ves. jun. 404.

1805.

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same in tail to *Thomas Leech*, with remainder to *George Leech* in tail also, and an ultimate remainder to his own right heirs. In this way, on the death of his sisters and his cousin, he made a certain provision for *Thomas Leech*, but to *George Leech*, if the construction contended for on behalf of the *defendant* be right, he gave nothing but an estate-tail in remainder after an estate-tail, which might be defeated by the preceding tenant in tail. But it would be strange to suppose that the testator meant, that which might be his only provision, should depend upon the contingency of the estate for life of *Mrs. Lena Imber* taking place. If *George Leech*, who had lost his estate in *Holmers* on such a condition, had had any immediate provision for him out of the other estates, one might have accounted for the estate at *Holmers* not being intended for him; but in this will there is no one circumstance to make it appear that he was not intended to take after either alternative. The object of the settlement of each estate was to make a general provision for the family, and he had his whole estate in view at the time. In the devise of the *Upton Gray* estates, he devises over the reversion in fee to his own right heirs, but there is no such provision with respect to the estate at *Holmers*, and the inference is, that it was not his intention that such reversion should go over in the contingency which has happened. The words of the will are certainly inaccurate. The devise is in these words, 'As to my freehold lands at *Holmers*, I hereby give and bequeath to my sister *Imber* for her life; or, if she should survive and outlive my wife and sister *Heath*, so that she shall come into the possession of my estate at *Upton Gray*, then I hereby give and devise the said estate called *Holmes* to my dear good friend *Mrs. M. L. Imber* for her life, towards the support, education, and maintenance of my above-named cousins *Thomas* and *George Leech*; and after her decease I hereby give the

same to the said George Leech for ever." Here the word *or*, in its natural meaning, has a most plain and necessary office to be referable to two or more alternatives. In order to make it single, the word *or* must either be struck out, and the word *and* substituted in its place, or the word *or* wholly omitted. In the other case those words may be supplied which appear to be admissible to make out the sentence. If the word *or* were used in its proper sense he had some alternative which he had omitted. Thus let us place for the first branch of the alternative the death of his sister *Imber*, because the estate is given to her for life; and in an event which is fixed by the other alternative, her interest was to cease. Instead of the sentence as it stands, let us therefore read "*after her death*," or if she should outlive my wife so as she should come into the possession of the estate at *Upton Gray*, then I hereby give it to Mrs. *Lena Imber* for her life; and after her decease to *George Leech* and his heirs for ever. "This way of reading the will makes it entirely agree with what on the whole must have been the intent of the testator, and supports the necessary, and in our opinion the only alternative which was intended by the testator. In the case of *Doe d. Lee Compere v. Hicks and another*,* where there was a devise to A. for life, and afterwards to trustees and their heirs, to preserve contingent remainders, with a devise over in tail and a second devise to trustees, in manner aforesaid, the court read the will as if the words "*during the life of the several tenants for life*," had been inserted in each of the devises to the trustees. In *Spalding v. Spalding*, † the court supplied instead of the words, "if *John* die, living the testator's wife *Alice*," these words, "*if John* die without issue, living *Alice*," in order to support the intention

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* 7 Term Rep. 433.

† Cro. Car. 180.

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of the testator. And in *Foncreau v. Foncreau*,²⁴ where there was a devise of the interest of 5400*l.* in trust amongst the testator's children, and to be divided, amongst such of their children, as they should appoint, and in default of appointment to the issue of his said children at 21, and in case any such issue should die before attaining 21 years, then over; as there could be no reason for a devise over in case of the issue of a child dying, and not in the case of the child itself dying without any issue at all, the court held that the share of the child dying without issue, should go over in like manner. These cases are stronger than the present, because there the structure of the sentence was perfect. For these reasons we think there must be

JUDGMENT for the PLAINTIFF.

The BAILIFFS, BURGESSES, and COMMONALTY of the Borough of TEWKESBURY, in the County of GLOUCESTER, against DISTON.

A corporation being entitled by prescription to toll on all woads brought into the market, and there sold on a market-day, but in which of late it had become the practice to sell by sample, and upon which sale by sample they had claimed the like toll for corn sold in the market; held that where A. bought of B. in the market by sample to be delivered in the borough, A. knowing B. not to be a freeman exempt from the toll, and the corn not to have been in the market, and the toll not to have been paid, and which corn was the next day delivered, the corporation could not maintain a case against A. for such sale in fraud of the toll. Q. whether it would lie against B? Held also, that such sale by sample is not evidence of a sale by bulk, upon a count for purchasing corn in the market in bulk, and not paying the toll.

The BAILIFF,
&c. of
TEWKESBURY
VERSUS
DISTON.

THIS was an action on the case. The first count of the declaration stated the plaintiffs to be possessed of a market in Tewkesbury, holden on every Wednesday throughout the year, except on Christmas-day

1802.

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&c. of
Tawkesbury
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when it happens to fall on a *Wednesday*, for the buying and selling corn and grain and other goods usually sold in markets, and that, by reason thereof, they were entitled by way of toll to a *peck*, viz. two gallons and one quart, for every 48 bushels of corn or grain brought into the said market, to be sold, and there sold, on any such market-day, not being corn or grain sold by any freeman of the Borough, nor of any persons legally exempt from the payment of toll, each bushel containing 9 gallons; and so in proportion for a greater or less quantity than 48 bushels. It then alleged that the *defendant*, fraudulently intending to injure the *plaintiffs*, and to defraud and deprive them of their toll, did, on a market-day, viz. on *Wednesday*, 17th of *November*, 1802, he not being a freeman of the Borough, nor a person legally exempt from the payment of toll, wrongfully and fraudulently buy in the market of *Tawkesbury* from one *John Dobbins*, he not being a freeman of the said Borough, nor a person legally exempt from the payment of toll, 96 bushels of wheat by sample, that is to say, of the same and like quality, with a small parcel of wheat which the said *J. Dobbins* then and there produced to the *defendant*, as and for a sample of the said wheat so bought as aforesaid, the said wheat or any part thereof not being in the said market at the time of the sale, nor brought by the said *J. Dobbins* into the said market, to be there sold, and the *defendant* well knowing that the said last-mentioned wheat had not been brought into the said market, to be there sold, and was not in the said market at the time of his buying thereof; whereby the *plaintiffs* were prevented from taking their toll out of the said wheat, as they would have done, if the said wheat had been brought and placed in the said market to be there sold and had been there sold; and lost and were deprived of the same. The second count only varied from the first by alleging that the 96 bushels of wheat were bought by sample, without any explanation of the word sample,

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The Bailiff,
&c. of
Tewkesbury
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Dobbin.

and were to be delivered to the defendant in Tewkesbury. The third count claimed the toll upon all corn brought in to the market to be sold, and there sold, on any market-day and delivered within Tewkesbury, and alleged the sale by sample in the same mode as the second count, and was in other respects similar to the two preceding counts. And the fourth count resembled the last in the claim of toll, and the mode of sale by sample, and alleged that the corn in question had not been brought into the market to be sold, and was not in the market when bought by the defendant, but was to be delivered afterwards to the defendant on a future day agreed upon between the defendant and the said John Dobbin. The defendant pleaded the general issue; and the cause came on to be tried before Mr. Justice LAWRENCE, at the summer assizes at Gloucester, 1803, when a verdict was found for the plaintiff's on the before mentioned counts of the declaration, with 1s. damages and 40s. costs, subject to the opinion of the court of King's Bench, upon the following case.

The plaintiff's have a market by prescription, holden at Tewkesbury on every Wednesday in the year except on Christmas-day, when it happens to fall on a Wednesday, for the sale of corn and other articles. All corn brought into this market to be sold; and there sold in bulk, has from time immemorial paid a toll by the buyer to the plaintiff's of twelve dishes, amounting to one peck on every 48 bushels, and so proportionally, more or less, according to the quantity. Until about 30 or 40 years back, all corn sold in the market was there pitched and sold in bulk. Since that period a practice has gradually prevailed of selling in the market by sample; but in such case the customary toll of the corn has also, till lately, been taken, when the corn has been delivered in Tewkesbury. On Wednesday, the 17th of November, 1802, the defendant not being a freeman of Tewkesbury, nor exempt from the payment of toll, knowing the plaintiff's claim of toll upon buy-

ers in their market as above stated, bought by sample in *Tewkesbury* market of one *John Dobbins* a farmer, who was neither a freeman nor in any other way exempt from the payment of toll, which defendant knew, two loads of wheat to be delivered in *Tewkesbury*. At the time of the purchase the wheat so bought by the defendant, was in the barns of *John Dobbins*, and the defendant knew that it was there, and that it had not been pitched in the market or paid toll as if it had been pitched. Afterwards, viz. on the 18th and 20th of the same month, the said wheat was delivered to the defendant in *Tewkesbury*. Of this wheat the customary toll was demanded by the officers of the corporation, but was refused by the defendant. The question for the opinion of the court is, whether the plaintiffs are entitled to recover. If the court shall be of opinion that they are entitled to recover, the verdict is to stand; if not, a nonsuit is to be entered.

In addition to this case after the first argument, a fifth count of the declaration was subjoined as follows.

“And whereas also the said plaintiffs, on the said 1st of October, in the said year of our Lord 1802, and long before, were and from thenceforth continually hitherto have been, and still are lawfully possessed of a certain other market holden and to be holden in *Tewkesbury*, aforesaid, upon *Wednesday* in every week throughout the year, except on *Christmas-day*, when it happens on a *Wednesday*, for the buying and selling of corn, and grain, and other goods, wares, and merchandizes usually sold in markets, and by reason thereof the said plaintiffs, during all the time last aforesaid, of right ought to have had and still of right ought to have a reasonable toll of all corn and grain, brought into the said last mentioned market to be sold; and there sold on any such market-day, not being corn or grain, sold in the said last mentioned market by any freeman of the said Borough, nor the corn or grain of any other person or

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The Bailiffs,
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Tewkesbury:
versus
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1842.
 The Bailiffs,
 &c. of
 Tewkesbury
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 Dutton.

persons legally exempt from the payment of such toll, (that is to say) one peck, to wit, nine gallons of corn or grain, during all the time aforesaid, brought within the said last mentioned market to be sold, and there sold, and so in proportion for a greater or less quantity than 48 bushels; and whereas the said *defendant*, on *Wednesday*, the 17th day of *November*, in the year of our Lord, 1842, the said *Wednesday*, being such market-day, he the said *defendant* then not being a freeman of the said Borough, nor a person legally exempt from the payment of the said toll, bought in the said last mentioned market in *Tewkesbury* aforesaid, of and from the said *John Dobbins*, he the said *John Dobbins* then not being a freeman of the said Borough, nor a person legally exempt from the payment of the said tolls, divers to wit, 96 bushels of wheat, which had been brought by the said *John Dobbins* into the said last mentioned market, to be there sold: by reason whereof they the said *plaintiffs*, then and there became and were entitled to receive of and from the said *defendant* their toll due to them, for and in respect of the said last mentioned wheat so bought by him as aforesaid, that is to say, 2 peck of the said wheat, being at the rate of one peck of and for every 48 bushels, of the said last mentioned wheat as aforesaid, as and for the said toll, and the said *plaintiffs*, then and there demanded the said toll of and from the said *defendant*, and required of him to render and deliver the same to them; yet the said *defendant*, not regarding the said last mentioned persons, but wrongfully intending to injure and prejudice them the said *plaintiffs*, in this behalf, and to defraud and deprive them of the said tolls, so due to them in respect of the said last mentioned wheat so bought by the said *defendant* as aforesaid, did not, and would not then, or at any other time, render and deliver to them the said *plaintiffs* the said toll or any part thereof, although so to do, he the said *plaintiff* afterwards (to wit,) on the

same day and year last aforesaid, at *Tewkesbury* aforesaid, in the county aforesaid, was requested by them the said *plaintiffs*; but to render and deliver the same toll, or any part thereof, to them, he the said *defendant* has hitherto altogether refused and still refuses.

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The BAILIFF,
&c. of
TEWKESBURY
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DISTON.

This case was twice argued most elaborately and ably in *Trinity* term, 44 Geo. III. and on two separate days last *Hilary* term, by PULLER for the *plaintiffs*, and ABBOTT for the *defendant*, on the first argument; and by WILLIAMS, Serjeant, for the *plaintiffs*, and by EASKINZ for the *defendant*, on the second argument.

Arguments for the plaintiff. "Here was a sale in market overt, and the seller produced a sample of corn to the buyer; they had the same advantage of the market, as if the corn had actually been pitched in the market and the buyer had requested the seller to keep it for him a few days in his warehouse. The benefit of the resort to the market of buyers and sellers was equally enjoyed by the parties here, and in fact when corn is sold in bulk, each individual judges of the bulk by only a small sample. And *Qui sciuit commodum sentire debet et curat*; for if a man has a fair, those who have shops next adjoining to the fair cannot open them on the fair day without paying stallage for the fair; for they cannot take the advantage without paying the duties. *Id est, id est, id est.* This is in fraud of the owner of the market, by which is meant, not an actual fraud in conscience, as an actual *deceit*, but a fraud in law, such as is stated in the conclusion of a common declaration, where it is said that the *defendant*, contriving to defraud and injure the *plaintiff*, hath not paid a sum of money due to him. If a man has a fair or market within seven miles of an ancient market, this is an injury to the ancient market; and there is a precedent in *Lilly's Entries*,

* *Guid. Hist. C. B. 65.*

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p. 30, to a declaration for erecting a new fair, wherein the *plaintiff* declares that the *defendant*, well knowing the premises, but contriving and *fraudulently* intending to deprive the *plaintiff* of the toll of his fair, *did* erect &c. yet it is not necessary to prove more than that there was an ancient fair, and that the new one was erected within 7 miles, and within 20 years time. So in cases of obstructing water-courses, and so for disturbance of common, it is always laid *fraudulenter*.* So in two cases in *Wynch's Entries*, for not grinding at the *plaintiff's* mill; and also in *Coryton v. Lythcbye*.†

Lord ELLENBOROUGH, C. J. "Fraudulently in general means wrongfully, in *fraudem legis*. It may mean otherwise, according to the subject matter, but it is an inference which the pleader puts upon the fact."

WILLIAMS. "In *Skinner v. Gunton* and *others*,‡ the *plaintiff* declared for a conspiracy in arresting the *plaintiff*, and holding him to bail without just cause, and only one was found guilty; and it being moved for the *defendant*, that this negatived the declaration, the court held that the material part was the imprisonment and holding to bail; and though it was laid *per conspiracyem inter eos habitam*, the court said it was an action on the case, and the material substance was the undue arresting of the *plaintiff*, and not the conspiracy.

It is in this sense of the word fraud that judges, when speaking of an injury in fraud of a market, and of frauds in other cases of the like nature, must be under-

* Lib. placit. 39, pl. 53. Ibid. 33, pl. 4. Lord ELLENBOROUGH, C. J. mentioned the *Prior of Dunstable's* case, 11 H. VI. 19, pl. 25, in which the word *fraudulenter* was not used, but the fact was laid *occulte*; but see further in the course of the argument.

† 2 Saund. Rep. 114.

‡ 1 Saund. Rep. 228.

1805.

The Bishops
&c. of
Tawkebury
versus
Diazor.

stood; and so must Lord KENYON be understood in the case of *Mosely v. Pierson*,* when he says there might be an action for the fraud which the defendant committed by withdrawing the thing from the market. So must Lord Mansfield be understood in *Blakey v. Dimsdale*,† where he says, if this is a fraud on the owner of the toll, the action must be on the case. In this sense of the word *fraud* both the buyer and the seller commit a fraud on the owner of the market; and if the action for this fraud could be brought against both, it may be brought against one only; for there is no pleading in abatement in *tort* that the fraud was committed with divers others. In the case put by *Rolle*, if the house is opened for selling goods near a fair, the action must be on the case for the fraud; for it cannot be for the *stallage*, nor for the *toll co nomine*; and though it does not appear from the book what was the action there, yet it is obvious that it could not be for a *trespass*, or for any thing but the *tort*.‡ The principle upon which the action is founded appears from the *Prior of Dunstable's* case:§ there the prior of *Dunstable* declared against I. B. a butcher, that he had the market of D. and the controul thereof, and that all butchers ought to sell on the market-day on the prior's stalls, and pay one penny *stallage*, and that the defendant had sold his meat on a market day at his own house, *occulte*, where

* 4 Term Rep. 177. † Cowp. 664.

‡ *Williams*, Serjeant, being asked if he had not referred to the *Roll*, he said he had often found such trouble in it, that, besides the expence, it was impossible to do it in many cases: he had sometimes searched five or six days for one case, for the reporter states only the term when the case is argued, but the *Roll* is entered when the issue is joined.

§ 11 H. VI. 7, 19, a, b, cited and stated by Lord Coke in the *City of London's Case*, Co. Rep. viii. 127, a.

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 The Bailiffs
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by, &c. to which the *defendant* pleaded that he was a householder at D: and averred a custom for all householders to sell their wares every market-day in their own houses, and it was thereupon laid down, that the prescription was not to the purpose, for if the prior had a market, and is lord of the town, you cannot prescribe to sell meat at your own house on a market-day; for the market cannot be but in an open place, and the prior would then lose the benefit of his market; and also he has the correction of the market to see if the goods are vendible, which cannot be tried by his officer if it be not in open market; so that when the market belongs to the prior, which cannot be but in the market place appointed for that purpose, he cannot hold a market in his own house, but in the common place upon the market-day; wherefore, &c.

LORD ELLENBOROUGH, C. J. "There it seems the issue was upon the *occulte*; so that the *defendant* would not be liable if the sale was *open*, and not *privily*, by which the public would be deprived of the resort to and publicity, and controul of the market; it seems to have been considered there as if the sale in the shop was an actual sale in the market, and that the delivery of the goods *occulte* was the gist of the injury."

WILLIAMS, Serjeant, "But the sale was in the *defendant's* house and not upon the *plaintiff's* stalls, and therefore no stallage could be due.* This is not an action for not bringing the corn to the market, but for buying in a market in a particular way by which the

* It appears from *Brooke, Prescription 23*; that the reason for the judgment was, that a market ought to be *public*, and not *privy*; and the pleadings were afterwards amended; and the *defendant* pleaded a custom that every burgess, seized of a messuage adjoining the High-street, might sell in his own messuage, and that he was a burgess seized of a messuage adjoining, &c. and sold, &c.

plaintiff is deprived of toll. Until within forty years, the people sold in the market in bulk, after that time they sold by sample; it would, therefore, have been a very hard action, if the corporation were to declare for not bringing the corn into the market by sample, when that has been allowed so long. If the corn might by possibility have been brought to the market, and it is prevented from coming there by the act of the defendant, that is an injury for which an action will lie. If a man, by forestalling the corn before it comes to the market, prevents it from coming there, an action will lie by the owner of the market, because of the possibility of his being injured;* yet *non constat* in that case, that even if it were brought to the market, it would be sold there, and the toll become thereby due.†

1805.
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LORD ELLENBOROUGH, C. J. "Then you contend that if a man is coming to a market, and another meets him, *per quod* he does not get to the market with his wares, *per quod*, the owner of the market is or may be, by possibility, injured, an action will lie."

WILLIAMS, Serjeant. "The mere possibility of injury is the reason why an action will lie for erecting a new market near to an ancient market on the same day. *Colliton v. Lytheby*.‡ In that case *Tryden*, C. J. does not take any notice of the actual fraud intended, but says that if it appears that the defendant, without any lawful authority, had erected his market within the distance, and that it was held on the same day, it must be presumed an injury."

He was here proceeding to argue upon the 5th count of the declaration, when it was observed that

* 6 Mod. 49, per Justice Powell.

† Here he cited also *Fitz. Abr. Action on the Case*, 282 *9 Ventris*, 26; and 40 E. III. pl. 24.

‡ 2 Sess. 117.

1804.

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Jcs. of
SARUMSBURY
versus
DICTON.

no such count was stated in the case, a verdict having been found for the *defendant* upon the 5th and 6th counts under the direction of the learned Judge (LAWRENCE, J.) who tried the cause; his being of opinion that the sale of corn by sample, without actual delivery, was no proof of a sale within the terms of those counts, for which opinion he relied upon the authority of the case in *Cowper*, 664. And as it was now suggested, on the part of the *plaintiffs*, that they had moved for a new trial on that direction, it was now permitted to them to insert the 5th count in the case; and, for that purpose the argument was ordered to stand over, and accordingly on a subsequent day he proceeded to argue as follows:

“ It being stated in the *declaration* that the corporation is entitled to toll by prescription, that is a right and title which courts of law will endeavour to protect against any fraud or evasion. The prescription is for corn brought into the market, and there sold, but if even a part of it is brought into the market as a sample, and the sale takes place there, the subsequent delivery of the greater bulk will have relation back to the delivery of the portion by way of sample, and thereby become an actual or at least a virtual sale of the whole in the market. So in 2 *Institutes*, 713, with respect to the change of property, by sale in a *market overt*, of goods which have been stolen, where there was a contract for a stolen horse made over night out of a market, and afterwards there was a delivery in the market, the bargain being that the *vendee* paid over night earnest to bind the bargain, but yet he was to have a choice of agreeing or disagreeing to the bargain afterwards in the market, it was held that the property in the horse was not changed by such a sale, because the delivery had relation to the sale, which was out of the market.*

* See also *Dyer*, 99, b. 66.

LE BLANC, J. "Suppose, in your case, such a conditional bargain had been made in the house of the *defendant*, before the market-day, and the corn had been delivered in the market, then according to your argument, your clients would not have been entitled to take the toll."

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&c. of
Tewkesbury
versus
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WILLIAMS, Serjeant. "In all cases of executory acts, the thing which is executory, when done, will have relation to the previous act or contract, and will make but one act. *Hawkins and Hare*;* *Shelley's case*.†

LORD ELLENBOROUGH, C. J. "These authorities are very strong to shew a relation as to point of time, but do they apply so as to make a relation as to the locality of an act? How can this relation in law make the corn so delivered, that, at the time of the sale and, *virtual* delivery, you can take the toll out of the corn delivered? The *plaintiffs* cannot say that it was there delivered in the market."

ERSKINE, *contrd.* "The corporation of *Tewkesbury* wish to draw into the market that which they are not entitled to by the charter, and which the crown could not grant to them, if it were inclined so to do." Here he went into a short review of the history of grants of markets by the crown, and of the right to toll by prescription, and cited 2 *Westminster*, 2, c. 31, and *Coke's 2d Institute*, p. 219. "The declaration here states that the *defendant* fraudulently bought of *Dobbins* a quantity similar to a certain sample; but it does not state that the sample was any part of the bulk, and it expressly negatives that the bulk, or any part thereof, was within the market. As to the 5th count, it is unne-

* *Croke Jac.* 512.

† 1 *Rep.* 99, b. See also 6 *Ed. III.* 44 b. and *Bro. non est factum*, pl. 5.

1805.

The Bailiff,
 &c. of
 Tewkesbury
 versus
 Preston.

necessary to go into the consideration of the cases cited, because there is no evidence to support it in proof, in the prescription is even there stated to give a right to toll only for corn brought into the market, and then sold, and not for corn merely brought into the market or merely sold in the market. The prescription is express and clear as to this; and though it might have been presumed, for want of the evidence, from the practice of the last 40 years, that there was a prescription for toll on corn sold by sample, yet that is negatived by the case."

Lord ELLENBOROUGH, C. J. "They only say the practice for forty years has been different from the previous custom, and that in effect, there has been a practice of abandoning the inspection of the corn which the laws impose on them for the benefit of the public. For, *interest rei publicæ*, that the corn should be produced in bulk, that they may see not only that the measure is good and faithful, but that the commodity itself is good and wholesome. It is just like the case which we had the other day, of an inspector of skins appointed under an act of parliament, or any other similar officer, if he should agree to a practice of not inspecting the skins, and should yet demand the fee. Suppose nobody had brought corn to that market, must the party not buy corn of any one out of the market; must he go without his corn and starve? Do you happen to know what is the practice at *Mark Lane*, and whether toll is taken there upon corn sold by sample? If it is so, it must amount to an immense sum."

BRISKINE, "This is alleged to be a fraud upon the market; but there can be no fraud in thus buying if there is no fraud in selling, and it is clearly not fraudulent, because the sale by sample has been allowed so long. As to the case cited from 2 *Rolle's Abr.* 123, b. pl. 1, that a person having a shop adjoining to a fair

has no right to sell his goods there, which ought to be in the fair, in that case, if rightly understood, the *plaintiff* should declare that the goods were actually in the fair, and that the sale was *occulte*, secretly and fraudulently in the fair, as in the *Prior of Dunstable's* case. In *Yard v. Ford*, the jury found as it was stated in the declaration, that the market was set up without any *authority*, and, of course, it was a fraud upon the *plaintiff*; for the law, in case of no authority, will imply fraud; but here, where the act is *prima facie* legal, fraud must be proved expressly. In *Moseley v. Pearson*,* Lord *Kenyon* states expressly, that by the words in the declaration there, stating that the goods were sold in the market, he understands an actual sale in bulk, and not a sale by sample. He adds, it is true; that if the goods were not brought into the market the action must be for a fraud in not bringing them there to be sold; but that must evidently be an action against the seller only."

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LORD ELLENBOROUGH, C. J. "All the precedents certainly are for goods brought into the market, and there sold."

ERSKINE then said, in answer to the cases in *Ventris* and *Fitzherbert's Abridgment*, that if the lord brings an action against a man for preventing another from coming to his market, he must shew that he did so knowing of his intention to come there, and also fraudulently, with a design to prevent him."

WILLIAMS, Serjeant, in reply, stated the case of the *Prior of Dunstable* from the year books more fully than it was stated in *Coke's Reports*. The *defendant* pleaded first, *ore tenus*, a prescription of a right to sell by the inhabitants of the town wherever they pleased, and the court said, that could not be, because of the prescrip-

* 4 Term Rep. 404.

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tion for the *toll*, which was not denied. He then set up a custom for the inhabitants seized in fee of houses adjoining the market to sell, on the market-day, wares and merchandizes in their houses. But, said the court, "what do you say to the other allegation, that you sold *occultè*? whereupon they traversed the *occultè*." Now this proves two things; *first*, that if one has a market, he can compel persons to come to it; *secondly*, that if there is a custom for persons to sell goods in their shops adjoining the fair, they must expose their goods publicly, and not sell them *occultè*. Upon the case in *Ventris* being mentioned,

Lord ELLENBOROUGH again observed, "This seems too remote an inference to follow from the *per quod* I dare say, if the record had been stated it would appear that the party was going to the market, and that he otherwise would have sold his beasts there, and that the *defendant*, privately intending to injure the owner of the market, persuaded him not to come to the market."

The case stood over till this day, when the judgment of the court was delivered to the following effect, by,

Lord ELLENBOROUGH, C. J. after stating the case: "The *plaintiffs*, in every count of their declaration except the last, declare as of a sale of wheat not actually brought into the market, and there sold in bulk, but sold by sample, whereby the *plaintiffs* were prevented from taking their toll out of the said wheat, as they would have done if the said wheat had been brought and placed in the said market to be there sold, and had been there sold. In the last count the *plaintiffs* complain of the non-delivery of the toll on a certain quantity of corn, which is alleged to have been brought into their market to be sold and there sold. This count must be laid wholly out of the question; for it contains certain specific allegations of facts not in any degree substan-

tiated in proof. There was, in truth, no such corn as there alleged brought into the market to be sold; nor was there any corn sold there in bulk; nor did there ever exist any such *physical* possibility of rendering the toll of the corn in bulk as is in that count assumed, upon the sale of the corn. There are cases in which a sale by sample, and a delivery of the sample, may be considered as equivalent to a sale and delivery, for certain purposes, of the bulk: yet, it cannot be so, to afford the means of fulfilling the averment in this declaration; for no fiction in law, no symbolical delivery can operate by relation to make a subsequent delivery of corn a delivery at the time of the delivery of the sample, so as to give the *plaintiffs* an opportunity of actually taking the toll at the time of the sale, which can only be effected by natural means, namely, by the specific introduction of the commodity itself, in bulk, into the market. This count, therefore, and the material allegations of it failing, for want of proof, the case must turn upon the other counts only. In these the *plaintiffs* complain of the *defendant*, as the buyer of the corn by sample, and do not form their charge in the nature of a conspiracy against the buyer and the seller for a joint fraud upon them, but for the supposed fraud by the *defendant* in buying merely. In this respect the demand of the *plaintiffs* seems very oppressive: the case of the seller is indeed very different, as he can of course chuse whether he will bring his corn into the market or not; but the buyer has an excuse for purchasing in this mode which he, the seller, has not. The *defendant* cannot compel the farmer to bring his corn into the market, and he may be compelled to purchase his corn in this way or be deprived of the necessary supply of corn altogether. But it may be said that he may be liable on the ground of the fraud in the seller, and that both parties to the sale which is fraudulent must be liable, but it does not follow that it is a fraud unless

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the parties had an original intention of fraud, which is neither stated nor presumed: and indeed the practice of selling for 40 years by sample allowed by the corporation must sufficiently negative the presumption of a joint intention to defraud the corporation, and render the mere selling by sample not such an act as they can complain of as a fraud upon their rights. Instead of their being prevented from taking their toll out of the wheat, and losing the same as they have alleged, the injury consists rather in a breach of contract or duty between them and the seller in depriving the lord of the market of the composition instead of toll, than of the toll itself. Now, as the corn which he had bought some time before, by no fraud of his own, was not at *Tewkesbury* at the time of the sale, he had no benefit of the personal view of the entire bulk, nor had he the advantage which results to the buyer from the seller's being obliged to carry back his commodity in bulk, if he cannot dispose of it in the market. There is no other mode of sale and delivery than the sale in bulk to which the prescription for toll can apply, and which could justly entitle the *plaintiffs* to their claim for toll. And it does not appear that the injurious consequence complained of does follow, namely, the loss of the toll, for it does not appear whether if it had not been so purchased, the corn would ever have been sold in *Tewkesbury* market, and yet it ought so to appear in order to establish the consequential damage complained of. In the case cited of *Ashby v. White*,^a it is said, "there must, to maintain an action upon the case, be a possibility of damage; as an action on the case lies for the owner of an ancient market for erecting a new market near his; and yet Justice *Powell* says, perhaps the cattle that come to the old market might not be sold, and so no toll due, and consequently

no damage; but yet there is a possibility of damage." But this is at any rate an injury, and renders the estate in the market itself less valuable. And in the same case, 6 Modern Rep. 49, it is also said by Powell, Justice, that "to maintain an action, the party must have a real present damage or a possibility of a future one. As where one has a market and toll, and another is coming with goods to the market, for which, if sold, toll would be due, and a third person hinder him from coming to the market, an action lies for the lord of the market, because of the possibility of the damage." There the injury by the *defendant* is the private sale, which is supposed to have contravened the immediate interest of the lord. The law in all cases looks only to proximate and possible consequences in regard to damages, for if the hindrance in that case was occasioned by one not knowing that the beasts were going to the market, that might be shewn by him in his defence in order to repel the *plaintiffs'* claim to damages. Here the proprietor of the corn was not induced by the *defendant* not to bring it in bulk into the market, and it does not appear but that if he had not bought it, it would have been sold to some other person. This allegation, therefore, that the *plaintiffs* were thereby prevented from taking their toll, and thereby lost the same, is sustained by no evidence; and upon these grounds we are of opinion that the damage said to be sustained by the act of buying, as well as that of selling itself, is not made out in point of fact, and therefore there must be

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Dixon.

JUDGMENT for the DEFENDANT."

The KING against THOMAS PRICE, alias JOHN WRIGHT.

On an indictment for perjury at an election, in polling in the name of A. B, on a certain day, evidence that the defendant not being a freeholder

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and entitled to vote, polled and was sworn, though it does not appear by what name, is evidence to be left to the jury that the defendant polled in the name of A. B. and in that name took a false oath; for it shall not be presumed that there was more than one false oath; and if the defendant polled in his own name, he might prove it or rebut the presumption, by shewing that there was more than one false oath taken, in which case the identical oath could not be ascertained.

THE defendant was indicted for *perjury*, in voting at the last *Middlesex* election; and the indictment stated that heretofore, to wit, on the 24th day of July, in the 44 Geo. III. in *Brentford*, in the county of *Middlesex*, an election was had and made of one knight of the said county, &c. that at the said election, on the day and year aforesaid, the defendant, otherwise called *John Wright*, appeared as a freeholder of the said county, and claimed to be admitted to poll at the said election by the name of *John Wright*; and before he was admitted to poll, the said *Thomas Price*, otherwise *John Wright*, was required by the said candidates to take the oath prescribed by a certain act of parliament, made in the reign of his late majesty Geo. II. entitled, 'an act to explain and amend the laws touching the election of knights for the shire,' &c. and averred that the said defendant was duly sworn, and did take the said oath; "and that the said defendant, otherwise called *John Wright*, not having, &c. but minding and intending to prevent the due course of the said election, and unlawfully to aggrieve and molest the said *G. B. Mainwaring*," (one of the candidates) "and to cause and procure the said Sir *F. Burdett* to be wrongfully elected and chosen, at the said election to serve in the said parliament, as a knight, of the said county, did then and there, upon and in the oath aforesaid, so administered to and taken by him as aforesaid, and before he was admitted to poll at the said election, to wit, on the same day and year aforesaid, at *Brentford* aforesaid,

in the county of *Middlesex*, falsely, wickedly, maliciously, wilfully, and corruptly say, depose, and swear, among other things, in substance as follows, (that is to say,) "that he the said *defendant*, otherwise called *John Wright*, was a freeholder, in the county of *Middlesex*, and had a freehold estate, consisting of a house in the occupation of himself the said *defendant*, otherwise called *John Wright*, lying or being at No. 8, *Bell Court, Gray's Inn Lane*, in the county of *Middlesex*, and that the place of abode of him the said *defendant*, otherwise called *John Wright*, was at No. 8, *Bell Court, Gray's Inn Lane*, and that the said *defendant*, otherwise called *John Wright*, so minding and intending as aforesaid, after he the said *defendant*, otherwise called *John Wright*, had been so sworn and taken the said oath as aforesaid, did at the said election, to wit, on the same day and year aforesaid, at, &c. poll and give his vote for the said Sir *F. Burdett*, whereas, in truth, the said *defendant*, otherwise called *John Wright*, was not then or at any other time a freeholder in the said county of *Middlesex*, and had not then, or at any other time, a freehold in the said county; and so negativing each allegation of the oath.

1806.
The King
versus
Price.

At the trial before Lord ELLENBOROUGH, C. J. at *Westminster*, in the sittings after last *Michaelmas* term, the *defendant* was convicted upon evidence, which was in substance as follows :

The candidates agreed in writing, that the voters should be required to take the freeholders and bribery oaths only, and these were accordingly required of them and were taken. On the second day of the election a person polled at No. 2. in the *Holborn* division of the *hustings*, in the name of *John Wright*, No. 8, *Bell court, Gray's Inn Lane*, which house he said was his freehold, and he resided there; and to this he was sworn in the usual way.—No such person resided

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there ; but, in fact, one *Hampden Cross* occupied the house, and it was the freehold of one *Phillips*.—To prove that the *defendant* was the person who polled in the name of *Wright* as above, one *Henry Britt* was sworn, and deposed that he knew *Price* about a twelvemonth, that he saw him at *Moorgate* on the 1st day of the *election*, when he said he was going to the *Brentford* election, and on the 2d day he saw him poll at the election ; that he observed he was asked some questions, and he said he was a *frecholder*, and his name was *John Wright*, and he saw him sworn and kiss the book twice, at two different times, and that he stated that he lived in *Bell Court, Gray's Inn Lane* ; that he afterwards saw him at a small public house in *Brentford*, when he said to one *Stephen Taylor*, an agent for Sir *F. Burdett*, that “ he had done the trick for him, and would do it again ; ” and *Taylor* replied “ he did not care how often : he should have a pound note every time.” That he saw these two persons together, again, at another public-house in *Fore-street*, when *Taylor* said it was all right, and he should be paid a guinea, and recommended him to come the next day and bring some friends, and if they could not find *frecholders* ; they could find *freholds*. On his *cross-examination*, by some inadvertence he produced a paper, which he positively swore he had written all himself at the hustings with a pen and ink, which he had with him. This paper appeared, upon inspection, to be a note or memorandum of *Price's* voting for No. 8, *Bell Court, Gray's Inn Lane*, which it was evident was written by two different persons, and upon this fact, the counsel for the *defendant* so impeached the testimony of this witness, that in the summing up of the evidence, his *Lordship* directed the jury to consider whether he meant to say, that he wrote the whole of the paper, as his words were certainly to be understood, or only the words which were in his hand writing, namely, “ his *frechold*, No. 8, *Bell-court, Gray's Inn*

Lane, and which were spelt *Bell-cott Grasing lane*." But his Lordship said, he thought he pledged himself to be the writer of the whole; and that if they thought him perjured in this particular, notwithstanding the confirmation lent to his story in other particulars, it would be, in his opinion, better to lay it wholly out of their consideration, than to garble his testimony. The evidence of *Britt* was confirmed in the other particulars by one *Denbigh*, who deposed as to *Price's* polling on the second day, that he saw him poll with two others, strangers to the witness; that he saw his hand upon the book; and he confirmed the subsequent particulars, respecting the meeting him, with *Taylor* in Brentford, and afterwards at night, in *Fore Street*; and also in the words used by the *defendant*, and *Taylor*; but he could not swear that *Price* polled in the name of *Wright*, nor could he hear in what name he polled.

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The defendant, being convicted as before stated, *ERSKINE*, obtained a rule to shew cause, why there should not be a new trial, upon the ground that omitting *Britt's* evidence, there was no proof that the *defendant* polled in the name of *Wright*, though he might have polled in some other name; and in order to support the averment in the indictment, it was necessary that it should appear that he polled in the name of *John Wright*; and it was accordingly argued by the SOLICITOR GENERAL and GARROW for *the Crown*, and *ERSKINE* for the *defendant*, and in this term the opinion of the court was delivered to the following effect by

Lord ELLENBOROUGH, C. J., after stating the case, and that the question was of considerable importance in the administration of justice in criminal cases: "There was sufficient evidence that *Price* polled, and took a false oath on that day. He did not prove that he took the oath in his own name, nor does he

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even pretend it. Now it does not appear that more than one false oath was given, and therefore we ought not to presume, that there was more than one given; and if there was only one false oath given on that day, and a false oath is admitted and proved to have been given by *Price* on that day, then the presumption of the identity is unavoidable. But this is capable of being rebutted by other evidence. The *defendant* might not only have proved that he voted in the name of himself, but he might have shewn that some other person voted for a freehold which was not his own, and then the indictment, as applicable to him, would have been rebutted, by shewing that two persons voted for fictitious freeholds; in which case the fictitious freehold in question could not have been referred with more certainty to one than to another. The indictment was preferred at least six weeks before the trial, and the *defendant* had time to be prepared with his defence, and he must be presumed to have known in point of fact, what was proved by *Denbigh*; but there was no evidence offered on his part in denial of the charge; and it, therefore, appears to us that the evidence of *Denbigh*, by which it is proved that he polled, not being a freeholder, in the name of some person on that day, and took a false oath, was evidence competent to be left to a jury in proof of the averment in the indictment, that he polled in the name of *John Wright*, and therefore that the *verdict* of *Guilty* ought to stand."

RULE DISCHARGED.

The KING, against the Inhabitants of MORTLAKE.
Saturday, May 18.

B. a pauper and his family, comes into a parish under a certificate, and has a son W. born there, who quits his father's family, marries, and has children, and after the death of B., the son of W. is bound apprentice to, and serves with him. Held, he gains a settlement; for W. was removable, and not protected by the certificate.

ORDER of removal by two justices of *Mary Dormer* and her four children, from *Mortlake, Surrey, to Great Marlow, Bucks.* Upon an appeal to the quarter sessions, for *Surrey*, a case was reserved, which stated that *John Dormer* and *Anne*, his wife, being legally settled in the parish of *Hambleton*, in the county of *Bucks*, in *February 1700*, went with a regular certificate from *Hambleton* to *Great Marlow*, in the same county; and during their residence at *Great Marlow* under such certificate, had a son born there, named *William*. Both *John* and *William* lived and died at *Great Marlow*, without having gained any settlement in that parish. *William Dormer* left his father's family, married, and occupied a separate house of 4l. a-year in *Great Marlow*, and had a legitimate son named *Thomas*, who in 1766, being several years after the death of *John* the grandfather, and *Anne* his wife, was regularly bound apprentice to his father *William*, by indenture for 7 years, and served his apprenticeship under the same at *Great Marlow*. *Thomas Dormer* was afterwards married, and had a son, *Thomas Dormer*, now deceased, who was the husband of the pauper, *Mary Dormer*, and the father of the four children removed with her by the order appealed against. The single question on the hearing of the appeal was, whether under the apprenticeship of *Thomas Dormer* the elder, to his father *William Dormer*, and the statute 12 *Anne*, c. 18, *Thomas Dormer* the elder had gained a settlement in *Great Marlow*? *Thomas Dormer* the younger, not having gained any settlement in his life-time, and the paupers having no other settlement there, than a derivative one under the said *Thomas Dormer* the elder, who had done no act to gain a settlement, in *Great Marlow*, unless he did so by serving the said apprenticeship. The court of quarter sessions, being divided in opinion, allowed the appeal *pro forma* in order to take the opinion of this court.

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THE SOLICITOR-GENERAL and MARRYAT were heard for the appellants, and cited several cases; but as, after the judgment, the SOLICITOR-GENERAL thought it necessary to offer a sort of apology for MARRYAT's signing a case, and arguing against his own opinion, it is needless to detail those arguments.

LAWES and BARROW contra.

LORD ELLENBOROUGH, C. J. "The question in this case turns upon this point; whether *William Dormer's* residence in *Great Marlow* was covered by the certificate of his father *John Dormer*? If *William Dormer's* residence ceased to be a residence under the certificate of his father, after his death, then the service, as an apprentice under him, will confer a settlement. By the 8 and 9 W. III. c. 30, if any person comes to reside in any parish, with a certificate from the church-wardens of another parish, that he is legally settled in such last parish, such certificate shall oblige the said last parish "to receive and provide for the person mentioned in the said certificate, together with his or her family, as inhabitants thereof, wherever they shall become chargeable." The question, therefore, turns upon the meaning of the word *family*. In ordinary language this might include not only the persons mentioned in the original certificate, but all his family and descendants after born; but this would be a very inconvenient construction, for it would make it necessary, in many cases, to trace a pedigree with great nicety. There has therefore been a restriction on these words introduced in many cases. Thus in *the King v. Durrington Inhabitants*, 4 Term Reports, 797, it has been held that the word *family* must mean those who form a part of the family household of the father who is protected by the certificate, all who live under the same roof, and constitute his *fixe* side, as was said by Lord Kenyon. Now does that apply to *William Dormer*, after the death of his father? Certainly not.—He had then become the object of a new settlement,

a person capable of collecting about him the rest of his family, and constituting a new fire side, as it were, of his own. Then it is said that an apprentice to a wife, who is married after the certificate granted, and whose husband is dead at the time of the apprenticeship, does not gain a settlement, because the certificate extends to her as a part of the deceased husband's family.— But that was both the root and remains of the family, included in the certificate, and there was not existing there, as there is here, any head of another family; for here the son starts for himself, as a new head of another family. He is *foris familiaris*; and if so, there is no question but he can confer a settlement; and I consider *Thomas*, the son of *William*, who was so *foris familiaris*, as having gained a settlement. The words in the recital of the statute 12 *Anne*, c. 18. § 2. are, 'whereas many persons obtaining and bringing such certificates' do take apprentices who gain settlements, 'though such masters coming with such certificates, have, by virtue thereof, no settlement in such parishes; and it enacts, that any person who shall be an apprentice to any person 'who did come into or shall reside in any parish, by means or license of such certificate, and not afterwards, having gained a legal settlement in such parish, shall not gain a settlement by reason of such serving therein,' I have been looking at the other act of parliament 8 & 9 of *William* 3. c. 30, and I am of opinion that the words must be construed in a copulative sense. The latter statute only contains the words 'shall come into the parish there to reside, and shall actually reside,' and says that he or his children though born there, not having otherwise acquired a legal settlement there, may be removed."

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GROSE, J. "The question is merely, what is or is not a part of the father's family, and this seems to me to have been well decided in *the King v. Darlington*.

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versus
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of MORTLAXE.

Let us, therefore, look in this case to see, whether this person, *William Dormer*, formed a part of his father's family. Now he had left his father's family, and it is so stated in the case; he had married and was a house-keeper; and his son was bound apprentice to him. I really do not know how to state a case in terms which shall be sufficient to shew how he could be less a part of his father's family than this. Having ceased to be part of his father's family, he was clearly not within the certificate, and therefore, by virtue of his apprenticeship, gained a settlement."

LAWRENCE, J. after expressing some surprise that twelve gentlemen at the sessions could have been divided on such a question, "This case has been said to be governed by the *King v. Sherborne* *; but that case only turned upon the child being a part of the family. What however, was the purpose of the statute of the 12 *Anne*, c. 19, but for preventing persons who could not themselves be a burthen upon the parish, from bringing burthens on the parish? That is to say, it enacted that no man who himself could not have a settlement in the parish, should be capable of conferring any settlement on another, by hiring or apprenticeship. But under the authority of the *King v. Heath* †, this person was liable to be removed; therefore the mischief to the parish, which was provided against by the statute, could not happen; for, if they thought he would bring a burthen upon the parish, they might remove him and his servants."

LE BLANC, J. "I am clearly of the same opinion. Whether the master was settled in the parish, was not the question; but, whether he was within the meaning of the two acts of parliament. By the statute of 12 *Anne*, c. 19. the service under a person

* Burr. § 6, 182.

† 5 Term Rep. 583.

who has come into a parish under a certificate, not having gained a settlement, shall not confer a settlement. But at the time of this service, the family which came into the parish under the certificate was at an end. He was at the head of a distinct family, and was not to be considered as residing any longer under the protection of the certificate. Then what decision is there, which says that such a person cannot confer a settlement? The meaning of the act of parliament, was, that persons who are incapable of being removed, shall not be the means of bringing a burthen upon the parish ; but under the cases of *the King v. Darlington*, and the *King v. Heath*, he could be removed. With this view of the case, it appears clear, that the decision of the quarter session was wrong, and that the order must be confirmed.

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RULE ABSOLUTE.

The KING against the CONSERVATORS of the great Fens, called the BEDFORD LEVEL. May 17.

The conservators and commonly of the Bedford Level are empowered by stat. 15, Car. II. c. , to elect a register, and other officers. This register is to register all deeds of conveyances ; which thereupon have the effect of bargains and sales enrolled, and are of no effect until so registered, and at such election only proprietors of 100 acres of fen land, by conveyance so registered, are entitled to vote. They appoint also a deputy register in aid of the register : the register dying, an election is had of a new register ; held, that by the death of the principal, the office of the deputy register ceases, and lands held by conveyances registered by him after that time and before the election, do not entitle the proprietors to vote at such election. Such an office is not the subject of a quo warranto ; for it is no usurpation of a franchise upon the crown, and the proper remedy upon an election obtained by a majority of such votes, is by mandamus. Semble, though a quo warranto should lie in any case, it may not be alone, a good cause for registering a mandamus.

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vs.
THE CONSER-
VATORS OF
BEDFORD
LEVEL.

THIS was an application for a *mandamus* to admit and swear *Edward Christian*, Esq. registrar of the Corporation of the *Bedford Level*.

The affidavit of Mr. *Christian* stated that the governor, bailiffs, and commonalty of the conservators of the Great Level of the *Fens*, was incorporated by an act passed in the 15th of *Charles II.* intituled "An Act for settling the draining of the great Level of the *Fens* called *Bedford Level*," which, reciting that 95,000 acres of lands there were vested in *Francis Earl of Bedford*, and his adventurers and participants, enacted that he and his heirs and assigns, and the said adventurers should be a corporation, and that the said corporation should meet as often as they pleased, and appoint a *register* and other officers, and that none of the commonalty should have voices that had not 100 acres of the said land; and that all conveyances of the said land entered with the register should be of force to convey a freehold, as if the same were enrolled within 6 months in the *King's Bench*, and no grant or conveyance should be of force but from the time it should be so entered, &c. That the usage of the said corporation appeared from the books to be to hold a court about once a year at *Ely* in *April*, to elect a *register* and other officers. That *Charles Nalson Cole* was many years *register*; that at the *April meeting 1804*, the corporation elected him *register*, with a salary of 100*l.* a-year, and *T. Gotobed*, Esq. *deputy register*, without a salary; and that *Cole* died the 18th *December, 1804*. That on the 17th of *April, 1805*, there was an election for the office of *register*. That Mr. *Christian* and a Mr. *Saffery* were the candidates; that *Christian* frequently objected to the admission of votes which arose from lands conveyed by deeds registered by the said *deputy register*, after the death of the late Mr. *Cole*, and not before; that *T. Market* and eleven others, tendered their votes for

Mr. *Saffery*, and were objected to on that ground, and they appeared to be so entered. That at the close of the *poll*, by consent, there was a scrutiny, and upon argument, all the said votes were ordered to be added to the votes for *Saffery*; and one voter of the like nature for *Christian*; and the numbers were for *Saffery* 82, and for *Christian* 80; whereas if the said votes had not been allowed, there would have been 80 for *Christian* and 70 for *Saffery*. That from the books in the *Fen* office, it appears that before *Cole*, there were but four registers since the act: that three had each an assistant or deputy at the time of their deaths; that it does not appear that between the intervals of the deaths of the said principal registers, and the election of their successors, the deputies entered any conveyances, except the said *J. Gotobed*, as aforesaid. But the first instance of an appointment of an assistant, or deputy register, was in 1762, when the court appointed Mr. *I. Hope*, by reason of Mr. *Bland*'s sickness, to officiate in his place as register, till further orders; that afterwards *Bland* being dead, there was an order that *Hope* should be and continue register in his place; that at his death there was an entry as follows, 'New register appointed; Mr. *I. Hope* being lately dead, this corporation doth think fit to appoint Mr. *W. Plaxton*, the said late deputy's register, to execute the office of register, until a new election shall be made of a register according to the said act.' That *Plaxton* had no deputy; that *Woodward* succeeded him in 1756, and had a deputy, Mr. *Melmoth*. That *Woodward* dying in 1757, the board ordered that *Cole* should be appointed in his stead till the next *April* meeting, when he was elected, and was re-elected every year since.

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LEVEL.

Saffery, the other candidate, stated in his affidavit, the usage to elect a deputy register, and other officers

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not named in the act; that since the act, there had been six registers, and twenty-three appointments of deputy registers. That in 1692, there was a resolution that the office of register being a sworn office, should be managed by the register himself, and no deputy; unless upon sickness or some other extraordinary occasion, and then to be allowed of and appointed by the corporation. That the deputy registers were usually sworn, and often signed registers and certificates; that in 1721 and 1722, the attendance of the register was wholly dispensed with, by the board, on account of his ill health, but he was allowed his salary; and that the fees for registering deeds and other perquisites of office, were by the said order received by the then deputy register. That in 1794, *John Gotobed* was elected deputy register, and continued until 1802, when *T. Gotobed*, his son, was elected. That it appears that formerly the corporation had occasion to meet very frequently, and that at the first meeting after the register's death, which usually took place within a few days, they proceeded to elect a new register, till the next *April* meeting; and that it does not to his belief appear that at such death and previous to the appointment of the new register, there were any deeds remaining in the office unregistered, or left at the office to be registered, previous to the time of *Mr. T. Gotobed*; and he believes it has been the constant practice to mark as the day of the entry in the book, the day on which the deeds came in, and not the day of their being actually entered. That it does not appear that any register appointed a deputy; that upwards of two hundred and thirty deeds were registered by *Mr. John Gotobed*, seventy by *T. Gotobed*, before the death of *Cola*, and upwards of sixty between that time and the 17th of April, 1805. It then proceeded to state an objection, made to the closing the poll on the day when the election ended, and several objections to

voters for Mr. *Christian* on other grounds, which are not material to be here stated.

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waters.

The SOLICITOR GENERAL, WILSON, and ABOTT shewed cause. "This being a case of an election where votes are taken for the two candidates, and on which a *quo warranto* will lie, the court will not proceed by *mandamus*; *Rex v. Colchester*, *Rex v. Lyme Regis*. The objection here to the title of Mr. *Saffery* is that the votes have been taken of persons who have not a good title to the lands, in respect of which they claim to vote, and this objection to his election will have the most fatal effect, in a great number of cases, of making void the conveyances to lands, and letting in objections to titles; as in bankruptcy and other cases which may be put. This depends upon the right of the deputy register to enter deeds; and whether he is in of right or not, must be immaterial, for in these cases it is sufficient if the officer is seen acting as an officer *de facto*. The object of the *Bedford Level act* is only to have a register in order to shew the title of the corporators. This person is in fact not the deputy of *Cole*, but an officer appointed by the corporation to act for a year."

LORD ELLENBOROUGH, C. J. "If they appoint him to act as register, then the corporation must be taken to appoint two registers."

SOLICITOR GENERAL. "According to *Curles' case*,* where it is held that though a statute appoints an auditor, yet there may be a grant of one office to two persons, it will go to be executed by the survivor. The appointment of a deputy was probably with a view to this very case, and though it is said that there is no instance of a registry of deeds by the deputy after the

* 11 Rep. 4.

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death of his principal, yet the fact might have been so, though it does not appear, as the registers are not dated till the deeds are brought in: this resembles the case of a grant of a copyhold; and *Manwood* C. B. in the case of *Knowles v. Luce*,* says "another diversity is of a grant by one steward, who has colour but no right to hold a court, and that of another who has no right; for if one who has colour, but no right, does an act, that is good; as under steward when the steward is dead."

LAWRENCE, J. "He puts the case of the under-steward, when the steward is dead, as an instance of a steward having colour. If you state a conveyance of a copyhold, you state it to be by the steward or deputy steward."

WILSON cited the *King v. Nicholson*,† also *Strange* 1213, and 3 *Burr.* 1831, in order to shew that the proper remedy would be by a *quo warranto*; and contended, that although styled deputy register, yet *Gotobed* was in fact a co-register with *Cole*, and that as the office was merely ministerial, it might be granted to two persons. *Comyn's Digest*, tit. *Officer*. *Young v. Steward*.‡

ERSKINE, LAMBE, WARREN, C. and LITLEDALL, *contrà*. "In a *quo warranto*, the party must shew an usurpation upon the crown, which cannot be done in this case. Though two persons might be appointed to one office, yet here the corporation has appointed a deputy, and not a co-register; and if they appoint two to one office, without appointing it also to the survivor, then it determines at the death of one of them; the *King v. Pugh*.§ Now though it should be a ministerial office, yet being an office of trust and confidence in the person,

* *Moor*, 112. + 1 *Strange*, 299. † *Sir W. Jones*, §11. *Cro. Car.* 280, 550. § 2 *Salk.* 465.

he cannot make a deputy ;* and if the deputy is to be appointed as an original officer by the corporation, they have no power, under the act, of administering the oath to him, for the words " other officers," must mean not a deputy register, but persons exercising other offices. Nor is *Gotobed* even treated as a joint-officer ; nor is there any thing in the appointment, as to their executing the office *divisim aut conjunctim*. If the office were joint, the deeds should be certified by both officers, or by one for both. With respect to the case of a deputy steward, the lord might admit himself, and the steward is his representative ; and when he appears and holds the court, it is apparent to all that he has at least a colourable office ; but here the corporation could not register, but must appoint a register under the act of parliament : and they could not appoint *Gotobed* to act for the remainder of the year, but must appoint an annual officer.

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LORD ELLENBOROUGH, C. J. " The only point for our consideration is, whether this person was or not a sufficient officer, *de facto*, to make these registries ? And as to the necessity of *quo warranto*, he is a mere officer at will, whom they elect from year to year, and there can be no pretence for a *quo warranto*. But I am rather pressed by the case in *Moor*, although the argument of Mr. *Littledale* goes far to shew that there is a difference."

LAWRENCE, J. " The only question is as to the power of the officer ; for a *quo warranto* is only requisite, where the body corporate has usurped upon a franchise, and is exercising it without authority. But I do not know that it is a general rule, that, where there may be a *quo warranto*, there may not also be a *mandamus* ; for it may be very well, that the case

* *Com. Dig.* tit. Officer, D. 2, cites 9 Co. 48. *Plow.* 377.

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should be first sent to trial, in order to ascertain the fact; but here there is no fact to try. It does not seem to me that the object of the corporation was to have *two persons* to execute *one office*. I do not know whether it is conclusive that he is not a deputy, because Mr. *Cole* did not appoint him; but the corporation have no power to appoint a deputy, whom yet their ministerial officer might appoint. If the ministerial officer might act by deputy, I take it that such deputy must be appointed by the principal; but yet the principal may allow the corporation to nominate the deputy, and he be taken to appoint such person."

Cur adv. vult.

Afterwards the opinion of the court was delivered to the following effect by,

LORD ELLENBOROUGH, C. J. "The only question of any importance in this case, is, whether *Gotohed* was a register *de facto* at the time of these registers, made after the death of *Cole*: and we think he cannot be so considered. We think he must be considered as a deputy register, and a deputy must be presumed to act under the assent and controul of his principal, and as a necessary consequence, after the death of his principal, whose assent can no longer be presumed, his authority is determined. With respect to an officer *de facto*, the question is, whether he has such a colourable authority, into which the persons who are to act upon it cannot examine, as to induce them to register their deeds with him, or do such acts as he assumes a power to do. For an officer *de facto* is one who has the reputation of being the legal and well authorized officer. But, in this case *Gotohed* was never more than deputy, and therefore, after the death of his principal, he could never have the reputation of being entitled to register deeds, for this reputation must clearly have ceased when it was known that *Cole* was dead. Now *Cole* died in *December*, 1804, and the election was not until

April the 16th, 1805, and some of these registers were made just previous to the election. As to the case in *Moore*, 113, it is not an authority for this purpose. That case, where *Manwood* says, "if one who has colour but no right does an act, that is good, as under steward, when the steward is dead," must be understood of one acting before the death of the principal is known, for if that was known, how could he have colour of authority? This doctrine of *Manwood*'s is indeed no more than what was law in respect of all judicial officers.

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We wish to be understood as saying nothing with respect to the office of any register since Mr. *Cole*'s death, as it affects other rights; and as it appears, that there were no such registers made on similar occasions before this time, we think there will be no particularly dangerous or inconvenient consequences to ensue.

RULE ABSOLUTE, for the *mandamus* to swear in Mr. *Christian* a register.

MARTIN and others against SMITH. June 29.

In *assumpsit* for the purchase-money of an estate where the condition of sale was to pay on or before the 14th of June, on having a good title; the plaintiff averred that he was seised in fee and made a good and satisfactory title to the defendant, before the 24th of June: Held, sufficient without further particularizing the title.

THE plaintiffs declared in *assumpsit*, in substance as follows, that on, &c. at, &c. they were seised in fee of and in certain lands and tenements, with the appurtenances, situate at, &c. and being so seised, afterwards, caused certain persons, to wit, A. B. and C. D. to sell by auction the said lands and tenements, with the appurtenances, subject to and under certain conditions of sale, that is to say, (stating them and *inter alia*,) thirdly, that the purchasers should pay down a deposit of twenty pounds per cent. and sign an

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agreement for payment of the remainder on or before the 24th of June, 1804, on having a good title. [Here the other articles were also set out.] And whereas the *defendant* attended at such sale, and there was the highest bidder and purchaser of the first lot of the said lands, (describing the same) for a large sum of money, to wit, 1500l. and thereupon, in consideration, &c. undertook; stating mutual promises to perform the conditions of sale. And the said *defendant*, in part performance, paid a deposit of 300l. and did also then and there sign an agreement that he would comply with all the conditions of the said sale to be complied with by him, as the purchaser of the said first lot; yet the said *plaintiffs* say that although, afterwards and before the said 24th of June, in the said conditions mentioned, to wit, on &c. at &c. the title to the said lands, so specified in the said first lot, was made good and perfect, and *satisfactory* to the said *defendant*, according to the said conditions of sale as aforesaid; and that they the said *plaintiffs* have always from the time of the said sale, and the said promise, hitherto been ready, and afterwards, to wit, on &c. at &c. offered, to convey the said lands with the appurtenances in the said first lot mentioned, to the said *defendant* according to the said conditions of sale, and hath been always ready, &c. Nevertheless, &c. (assigning a breach in the non-payment of the money.) There was a second count, stating the conditions, as before, and averring that a good title was made, and to the satisfaction of the *defendant*; and a third count, similar to the former, stating that the *defendant*, in consideration that the *plaintiffs* had, at his request, sold to him, and he had purchased a certain freehold estate, consisting, &c.; he, the *defendant*, undertook and promised to pay 1500l. on or before the 24th day of June, if then the title to the said freehold estate should be made good; and the said *plaintiffs* averred that afterwards, &c. the title to the said estate was made good. To these were added other common counts.

PLEAS, as to the first count, that after the sale and before the 24th of June, the *defendant* requested the *plaintiffs* to deliver to him a good and sufficient abstract of their title; but the *plaintiffs* did not at any time deliver such abstract, but refused so to do.

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DEMURRER to the second and third counts, for that it is not stated therein what estate, title, and interest the said *plaintiffs* had or have in the said lands, and that the sufficiency of the title of the said *plaintiffs* is by the said second count referred to the judgment of the jury, and not of the court.

REPLICATION to the *plea* to the first count, that the *plaintiffs* did not refuse and neglect to deliver such good and sufficient abstract as is in the said *plea* mentioned, when requested by the said *plaintiffs*, in manner and form as the said *defendant* hath alleged: to which replication there was a demurrer and joinder in demurrer, and also joinders in demurrer to the other demurrers.

SYMONDS, for the *defendant*, in support of the demurrer, relied upon the case of *Philips and Fielding*,* in which it was held that upon a sale of copyhold lands to be paid for upon having a good title, it was not sufficient for the *plaintiff* to aver only that he was ready and willing to make a good title, but he must shew that he had made a good title, and also what title he had. And he cited the *Duke of St. Albans v. Shore*,† and also *Pordage v. Cole*,‡ And contended that it was bad for want of shewing a tender of the conveyance.

DONALDSON, *contrâ*. "The declaration states that the *plaintiffs* were seised *in fee*, which is a sufficient allegation of the title; and this, therefore, differs from the two

* 2 H. Bl. 123. † 1 H. Bl. 270. ‡ 1 Saund. 319.
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cases cited, in which it was only alleged that the *plaintiffs* were ready and willing to make a good title. Here it is alleged, not only that they made a good title, but also a title satisfactory to the *defendant*. The *replication* is bad, because if the title was made good, it was not necessary to deliver an abstract; they might have stated the title verbally, or by producing the title deeds, or attested copies; or the *defendant* might have inspected the abstract in the hands of the *plaintiffs*; at least it need not be averred. The only article in the conditions which relates to this is the fourth, which states that the purchasers shall have proper conveyances, together with such attested copies as may be thought necessary, at their own expense, on payment of the remainder of the purchase-money conformably to the third condition; this, therefore, being a concurrent covenant, it is not necessary to aver or shew a tender of a conveyance, or of the abstract; for the *plaintiff* is not bound to do the first act. *Morton v. Lambe*,* *Rawson v. Johnson*,† *Waterhouse v. Skinner*.‡

Lord ELLENBOROUGH, C J. "It is too large a proposition to say that in every case of this kind the party must not only state the nature of his title, but that he must detail all the particulars of it. He avers that he is seised in fee, which must be such a seisin as would entitle him to convey; not a seisin merely for an instant as the conusee of a fine. Lord Loughborough says, in the *Duke of St. Albans v. Shore*, that the *plaintiff* must shew his title, and it is not sufficient to state merely that he has a good title. Now here he avers that he has made a *satisfactory* title, and what has he more to do, on his part of the agreement? These words in the declaration exclude the necessity

* 7 Term Rep. 125. † 1 East, 203. ‡ 2 Bos. and Pul. 447.

of making a distinction between this case, and that of *Philips v. Fielding*, with which I am not quite satisfied. In the case in 1 Lord *Raymond*, 202, *Powell, J.* only says that he should shew how he was patron, and that no issue can be taken on the words, whether patron or not. There indeed he may be patron in many ways, he may be seised in fee of the advowson, or he may have a right of presentation, *pro hac vice*. In that particular instance, therefore, it ought to be stated, how he is patron; but here he says he is seised in fee, and when you allege in the demurrer that he has not stated what estate he has therein, he may reply by referring to the declaration, where he says, 'I have made you a good title, with which you were satisfied.' Looking even at the words of the case in *Philips v. Fielding*, and comparing them with this declaration, Lord *Loughborough* says, what interest he had should be specially set forth; he has done so, for he says he was seised in fee; but then if it is required to be shewn how he is seised, whether by purchase or otherwise, he says the *defendant* was satisfied, and surely nothing more can be required."

GROSE, J. "It would lead to very great inconvenience and expense in pleading, if in every case the title of the party is to be set out. I should be very sorry if that should be required, and I should expect a very strong case to render it necessary. It is sufficient when he says that he was seised in fee, and made a satisfactory title."

LAWRENCE, J. "I have searched in order to find if there were any printed precedents, in the older books of entries, and I found some of actions brought by a vendor against a vendee for not paying for the estate, but none for not accepting of the estate. The *Duke of St. Albans v. Shore* was not on this point; and that which was said by Lord *Loughborough* there, should be

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considered, from what may be collected from the case, merely as his obiter opinion, and not his judgment. That case and also the case of *Philips v. Fielding*, are very distinguishable, for there the plaintiff made no allegation of title; but here he not only alleges the title which he has, but that it was satisfactory to the defendant, and that he refused to accept it. I really do not know what else is to be stated, for if he sets out the abstract, that is only to shew how he deduces his title in fee."

JUDGMENT for the PLAINTIFF.

FORTY against IMBER.—Saturday, May 25.

In action for rent arrear for two years and a quarter, under a scilicet, where the issue is upon the tenure, it is not necessary to prove the whole rent to be due for the whole of the time; but it is sufficient to prove rent due for any part of it.

FORTY
versus
IMBER.

THIS was an action of *replevin* for taking the goods and chattels of the plaintiff, tried at the last assizes for Surrey, before HEATH, J. The defendant made cognizance, as the bailiff of T. Anderson, and Jane his wife; and that the plaintiff, by virtue of a certain demise by them the said T. Anderson and Jane his wife to him made, for a long space of time, to wit, for the space of two years and one quarter of a year, and from thence until at, &c. held and enjoyed the said premises as tenant to the said T. Anderson and Jane his wife, at and under the yearly rent of 30l. payable quarterly, and because 67l. 10s. for two years and one quarter's rent, of the said rent became and was due and in arrear to the said T. Anderson and his wife, he, as their bailiff, took and distrained, &c. as for the said rent in arrear, &c. The plaintiff took issue upon the tenure, that he did not hold *modò et forma*, &c. There was a like cognizance, stating one *Mitchell* to be the tenant.

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The fee in the premises originally was vested in one *Stanfast*, who let to one *Michell*, and he underlet to the *plaintiff*; and the *defendant* never acknowledged him, the *plaintiff*, as his tenant. *Michell's* lease expired in 1795, but he held over at will; *Stanfast* then conveyed by *lease and release* of the 22d and 23d December, 1801, to *Anderson* and his *wife* in fee, describing the premises as in the tenure of *Forty* the *plaintiff*, as tenant at will; which conveyance was read in evidence. Rent for two years and a quarter was actually due. It was admitted that the 3d. cognizance could not be supported, but it was contended that the description in the deed was evidence that the *plaintiff* held of *Anderson* and *wife*: but the learned judge was of a contrary opinion, as the *plaintiff* was neither party nor privy thereto. But ultimately the question turned upon the necessity of proving the exact rent to be due, as laid in the avowry and cognizance, and it was contended that, as the title of *Anderson* and his *wife* did not accrue till the 23d December, 1801, there could not be two years and one quarter, but only two years' rent, due to *Anderson* and *wife*; and for the rest the avowry or cognizance should have been under *Stanfast* the former tenant in fee, and upon this ground there was a verdict for the *plaintiff*.

GARROW and BAYLEY now obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that the *quantum* of the rent due, which was laid under a *videlicet*, was immaterial, the issue being, merely, upon the tenure; and he contended, that as the rent was incident to the reversion, it passed therewith, and therefore there was in fact so much rent due at the time. That if *Michell* underlet to *Forty*, *Michell* was tenant; and if he assigned, *Forty* was the tenant; and one or other of the cognizances would apply to the case.

LAWES, for the *plaintiff*, *contra*, argued that the

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time was indivisible, and that the verdict should therefore stand, and he cited *Osborne v. Rogers** where the court held in assumpsit that on an averment that the *plaintiff* served from 21st March, 1647 to 1st November, 1664, to which the *defendant* pleaded that he served from the said 21st March to 31st December, 1658, with a traverse that he served till the 1st November, 1664, the *plaintiff* would be put to prove service for the whole time, and therefore such a traverse was bad.

LORD ELLENBOROUGH, C. J. "There is no issue here on the rent, but merely upon the tenure. Have you any case in which, where there was an *avowry* for a year's rent, and it was found that the *defendant* was entitled to one quarter's rent only, he was turned round upon such an issue. Upon an *avowry* under the stat. 11 Geo. II. c. 19, s. 22, there are three things essential to be proved; first, that the *plaintiff* holds under a certain landlord; next, enjoyment and occupation; and next, that there was some rent due for a part of the time avowed for. The statute has always been considered to have given a generality in the traverse, and to have put it upon the same footing as an *assumpsit* for use and occupation, which is given by the same statute. Cases, perhaps, have never occurred before the court, because it appears to have been thought too plain to be questioned."

RULE ABSOLUTE.

The KING against RICHARD MANSELL PHILLIPS.
 Monday, May 27th.†

An indictment for that A. intending to do bodily harm and mischief to B, and to break the peace, did send a certain letter to him, to provoke him to send him a challenge to good; although the jury

* 1 Saund, 267.

† Entered indictments 44 Geo. III. Middlesex, Michaelmas. A. 1803;

and on a former count, charging the same letter, as a challenge, that the defendant was not guilty.

1805.

The King
versus
PHILLIPS.

THIS was an information against the *defendant* for sending a challenge to one *Rees Goring Thomas*, contained in a letter, which was set out *verbatim* in that count. The third and last count was as follows, '*for that the said defendant, being an evil disposed person, and a disturber of the peace of our Lord the King, and intending to do bodily harm and mischief to the said R. G. Thomas, and to break and disturb the peace of our Lord the King, afterwards, to wit, on &c. wickedly and maliciously did endeavour to stir up, provoke, and incite him the said R. G. Thomas (then and there being in the peace of God, and our said lord the king,) to fight a duel with and against him the said defendant by then and there writing, sending, and delivering, and causing to be written out and delivered to him the said R. G. Thomas, a certain letter from him the defendant to him the said Thomas, containing therein divers scandalous, malicious, and provoking matters, and things, to, of, and concerning the said R. G. Thomas, that is to say, &c. (here the letter was set out in the same words as in the first count) with intent to stir up, provoke, and excite the said R. G. Thomas, to challenge him the said R. G. Thomas to fight a duel with and against the said defendant, and other wrongs, &c.*

The third count was for sending a challenge to fight, without stating the letter. And there was a fourth count nearly similar to the second.

Upon this information, the *defendant* was tried before Lord ELLENBOROUGH, C. J. at *Westminster*, and the jury found him guilty of sending a letter to provoke a challenge, as stated in the third and fourth counts; but acquitted him of the *first* and *second* counts, in which the letter was charged to contain a challenge to fight.

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versus
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Whereupon CLIFFORD, for the *defendant*, moved in arrest of judgment, that the offence stated in that count was not indictable; for that the jury having found, by their verdict of acquittal on the first count, that the letter itself did not contain a challenge, it did not appear that the *defendant* intended to fight the *prosecutor*, if he should have accepted the challenge. That his intention might be only to provoke the challenge from him, in order to have him taken before a magistrate, that he might be bound over to keep the peace; which would be an innocent intention, and not indictable. That the sending the challenge was not therefore such an act as necessarily implied a malicious and bad purpose: that it might be an overt act of an intent to commit a misdemeanour; but it was not necessarily so, and therefore not indictable, unless that intent were expressly stated; that for this reason, it could not be assimilated to the case of an indictment for attempting to set his house on fire, which could not be for an innocent purpose: and in order to shew that it was necessary to state that the *defendant* intended to fight, in case the challenge had been sent by the prosecutor, he cited *Lewis v. Jeffreys*,* and he also cited Lord *Darcey v. Jerois*,|| In the former case, the reporter says, "the *defendant* was fined 200*l.* in the *Star Chamber* for his misdemeanour in his challenge, albeit the *defendant* was of the age of 63 years, and so it seems that he intended to fight with him." Whence CLIFFORD now contended, that this was necessary in order to convict the *defendant*.

ERSKINE, GARROW, and ABBOTT, in *Easter term*, shewed cause; and after distinguishing the cases cited, relied upon the precedents in some late cases, particularly the *King v. Sir R. Mackreth*, in which there was a count similar to this, and upon which alone the jury could find

* *Popham*, 153. || *Hobart*, 324.

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PHELPS.

the *defendant* guilty, though there were in fact other counts, and the verdict was general upon the whole indictment. And they said that the intention to break the peace was an evident and necessary conclusion from the fact alleged, which could not be a meritorious or innocent act, any more than that of setting fire to a man's own house, which had been mentioned: for even there, if the *defendant* chose to build his house alone on a common, or on *Salisbury Plain*, *non constat* that it would be any injury to his neighbours if it were burnt down. That it was stated in the *count* that he intended to do bodily harm to the prosecutor, and that it was open to the *defendant* upon the general issue to have shewn that his intent was not to do bodily harm, but to have the prosecutor bound over to keep the peace. That this intent to fight and to disturb the peace, was either a fact to be proved in evidence, or was an obvious inference for the court, in law. And they cited the *King v. Schofield*,* the *King v. Higgins*,† and also the *King v. Woodfall*.‡

CLIFFORD, in reply, endeavoured to distinguish the cases cited, and the principles drawn from the cases as applicable to this, and relied upon the grounds before taken, that the circumstances stated in the indictment did not of themselves convey a malicious intention, and must therefore be made out by averments, which were wanting in this case. And he cited the *King v. Langley*,§ and contended that the omission could not be supplied by intendment,

Cur. adv. vult.

And now the opinion of the court was delivered to the following effect, by

LORD ELLENBOROUGH, C. J. After stating the case.

* *Caldicot*, 337. † 2 *East*, 5. ‡ 5 *Burr.* 2661.

§ 2 *Lord Raym.* 1029.

1805.

The KING
versus
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"The question here is, whether the count contains a sufficient charge upon which judgment can be given against the *defendant*. It has been argued on the part of the *defendant*, that the allegations in the information amount to no more than this, that the *defendant* sent a letter to provoke the prosecutor to return him a challenge, and that, although the sending of a direct challenge may, from its immediate tendency to a breach of the peace, be a misdemeanour, yet the endeavour by sending a letter to provoke a challenge, not having an immediate tendency to a breach of the peace, but only a tendency to provoke that which may have a tendency to a breach of the peace, and which is not an immediate breach of the peace, is not such a misdemeanour, unless it appears that a breach of the peace would have followed immediately upon it. The *Queen v. Langley*,* has been cited, where it is said that words which tend *directly* to a breach of the peace, as if one man challenge another, are indictable; and that case has been relied upon to shew that they must contain a direct challenge. But in that very case the distinction is taken, that if the words there had been written, the indictment would have laid, for that is a libel. And here we must recollect the provocation to the challenge, and the words which are used; "you have behaved like a blackguard," &c. which are all contained in a letter written by the *defendant*, and I do not see that when they have a tendency to provoke a challenge, they are the less indictable, because the effect is not directly produced which it was evidently intended they should. In the case of the *King v. Vaughan*,† the endeavour to induce a minister to recommend a person to an office, for money and from corrupt motives, is held to be a misdemeanour, because such recommendation is itself a misdemeanour. The *defendant's*

* *Salkeld*, 697. 2 *Lord Raym.* 29.

† 4 *Burr.* 2498.

counsel took it for granted that the indictment contained no averment, but that the *defendant* sent the letter with intent to provoke the prosecutor to send a challenge; but on referring to the introductory part of the indictment, it contains an actual allegation of an intent to do bodily harm to *Thomas* the prosecutor. In the *King v. Woodfall*,* Lord *Mansfield* says, 'where an act, in itself indifferent, is done with a particular intent, is criminal, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the *defendant*; and in failure thereof the law implies a criminal intent.' It is true, there cannot be any proof of a criminal intent unless it is alleged, but a criminal intent is in many cases no otherwise alleged than in this prefatory way. As in the case of the *King v. Horne*,† it was never argued that the criminal intention was not sufficiently averred by the introductory words there used, as 'the *defendant* being an evil disposed person, wickedly intending to stir up discontents and seditions amongst his majesty's liege subjects, &c. wickedly did write, &c.' It may however be said that where the criminal intention was necessarily implied from the fact of publication, but in the *King v. Topham*, it was held to be necessary that an indictment for libellous aspersions upon the character of the deceased Lord *Cowper*, should contain an averment that it was intended to excite his relations to revenge; and to a breach of the peace; and Lord *Kenyon* says, 'as nothing of that sort was stated in the prefatory part of this indictment, as that it was published with an intent to create ill blood, or to throw any scandal on the family and posterity of Lord *Cowper*, or to induce them to break the peace in vindicating the honour of the family, the judgment in that case was arrested. We have also inspected the original record in the case

1805.

The King
versus
Pellam &c.

* 5 Burr. 2667.

† Cowp. 672.

1803.

The KING
versus
PHILLIPS.

of the *King v. Langley*, which came on upon demurres, and there it is introduced with an averment, that the *defendant* being an evil disposed person, and contriving and intending to injure and defame, and to bring him into contempt, &c. (here his lordship stated the words of the introductory part of the indictment,) in the presence and hearing of divers persons, spoke the words there laid to his charge. There no objection was taken to the mode of averring the malicious and criminal intention, but only that the words spoken with such an intent were not indictable. If any particular intention is necessary to criminate the *defendant*, it must be stated; but in many cases the allegation of the intent is a mere inference of law; as in the case of a libel, where the act of publication is proved, it is not necessary to give any evidence of a malicious intention. But if not, then it becomes a matter of fact, and after verdict every material allegation must be taken to have been proved. The unlawful intent is, therefore, either a legal inference resulting from the letter, and the provocation given, or, if it is a fact which requires extrinsic evidence from the letter itself, it must be presumed to have been proved. And the fact of such intention, whenever it is necessary to be established, might be rebutted afterwards by the *defendant*, by means of other evidence. As if, for instance in this case, he did it to provoke a challenge from the prosecutor, in order thereby to obtain sureties for the pence against him, he might have shewn it in evidence in his defence and thereby might have repelled the inference of the intention either arising out of the letter itself, or from extrinsic evidence. Under this view of the case, whether the letter be considered as of itself containing a challenge or as intended only to provoke a challenge, it is sufficient in this case, and the rule for arresting the judgment must be

DISCHARGED.

TRINITY TERM.

M'COMBIE against DAVIES:—Friday, June 21st.

1805.
M'COMBIE
versus
DAVIES.

Where *A.* a broker; purchased tobacco for *B.* and placed it in the king's warehouse in his own name; and then transferred it into the name of *C.* as a pledge; held that *B.* after demanding the tobacco of *C.* and his refusal to deliver it up, might well maintain trover: for the taking the transfer of the tobacco is a conversion, although the same remained in the king's warehouses, the duties not being paid thereon.

THIS action was tried at *Guildhall*, in the sittings after *Michaelmas* term, 1804, and the plaintiff was nonsuited by direction of the *Lord Chief Justice*, who tried the cause, on the ground that there was no conversion by the defendant; a motion was made in *Hilary* term last to set aside the nonsuit, and for a new trial, and the opinion of the court was reserved upon the following facts;

That the plaintiff was a merchant in *Aberdeen*, and had employed a *Mr. James Rowland Coddan*, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase him some tobacco, which he accordingly did; that the tobacco; the subject of the action, was part of that tobacco; but the defendant had no knowledge of the transaction between the plaintiff and *Coddan*. That *Coddan*, the broker, bought the tobacco in his own name, and whilst it was in the king's warehouses, and had it transferred to him, in his own name, in the king's warehouses, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouses. That *Coddan*, being in want of money, pledged the tobacco in his own name with the defendant, for a sum of money, and transferred it into the defendant's name in the king's warehouses.

Afterwards an application was made to the defendant on the part of the plaintiff, for a delivery of the to-

1805.

McCOMBIE
versus
DAVIES.

tobacco in question; the *defendant's* answer was, that he had advanced money to *Coddan* thereon, that he did not know *McCombie*, and could not transfer them but to *Coddan's* order, and not till his advances were paid. That on the 6th and 7th of *November*, the following orders were addressed to the *defendant*.

B. A.—237—L.—649—597—659—508.

MR. DAVIES,

Sir—Please to deliver to the order of Mr. *Thomas McCombie*, the above five hogheads of tobacco, his property.

Your most obedient servant,

JAMES ROWLAND CODDAN.

MR. SOLOMON DAVIES.—Sir—I have to request you will immediately deliver to me five hogheads of tobacco, marked and numbered as below, the same being my property, and placed in your hands by my broker, *James Rowland Coddan*, whose order for their delivery I now hand you, and have to observe that if you do not deliver them over to me, I shall be under the necessity of entering an action against you to enforce their delivery, I am Sir, your obedient servant,

THOMAS M'COMBIE.

B. A.—No. 237—L. 649—597—659—508.

That the *defendant* received the said orders; but said, that he should not deliver the tobacco, until he was paid the money he had advanced to *Coddan*; that the tobacco still remains in the king's warehouses, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the *defendant*,

HARRISON, for the *plaintiff*, now contended that the casks of tobacco having been entered in the king's warehouses in the name of the broker, it was the same as if it had been in the name of the party himself; they were the property of the *plaintiff*; the transferring them into the name of the *defendant* was an act of changing the property; in so much so that

even upon payment of the duties, the king's warehouse-keeper could not deliver the goods to the *plaintiff*. This might have been good as an absolute transfer of the property, but it is not good as a mere pledge.

1805.
McCOMBS
versus
DAVIES.

Lord ELLENBOROUGH, C. J. here observed, that if it had been properly considered in that view, as it should have been, he should not have nonsuited the *plaintiff*. That the *defendant* treated it actually as his own, and refused to give up the tobacco to any one but Coddan, and not even to him, unless he paid the sum which had been advanced to him.

READER was to have argued on the other side, but the opinion of the court being expressed strongly against him, he did not proceed to discuss the question, and the rule for setting aside the *nonsuit* was made

ABSOLUTE.

CROSBY against WADSWORTH.

A. by parol, agrees to sell B. a standing crop of grass for 20 guineas; B. is to mow it and make it into hay, but no time is fixed for the mowing, or for the payment of the money, nor is possession of the close given. A. afterwards gives B. notice that he shall not have the grass, and sells it to C. B. enters privily and cuts part of the grass: A. then gives notice to him not to mow; and C. under the direction of A. mows and carries off the same. Held, that B. cannot have *trespass quare clausum fregit*, nor *de bonis asportatis*, for it is a contract for an interest in or concerning lands under the 4th section of the statute of frauds, 29 Car. 2, c. 3, and not being in writing, and being executory, A. might well discharge it.

CROSBY
versus
WADSWORTH.

THIS was an action of *trespass*, tried at the last Lent assizes for the county of Lincoln, before CHAMBER, J. when a verdict was found for the *plaintiff*, damages forty shillings, subject to the opinion of the court upon the following case:

The declaration stated that the *defendant*, on the 9th

1865.

CROSSY

V. WATSON

WADSWORTH.

of July, 1804, and on divers other days, &c. with force and arms, broke into and entered a certain close, whereof the said *plaintiff* was then lawfully possessed, and trod down, &c. the *plaintiff's* grass and hay, and cut down the *plaintiff's* grass then growing in the said close, and took and carried away the same, and also took and carried away the *plaintiff's* hay, then being on the said close and disposed thereof to his own use.

The second count stated, that the *defendant*, with force and arms, took and carried away other grass and hay of the *plaintiff*, and converted and disposed of the same to his own use. The *defendant* pleaded the *general issue*. The facts, upon evidence, were, that, on *Wednesday* the 6th *June*, the *plaintiff* agreed, by *parol*, with the *defendant* for the purchase of a standing crop of mowing grass, then growing in a close of the *defendant's*, situate in the parish of *Claypole*, for the sum of twenty guineas. The grass was to be mowed and made into hay by the *plaintiff*, but the parties did not absolutely fix upon any time at which the mowing was to be begun.

No earnest was given, nor was any note, memorandum, or writing signed by either of the parties, or by any person on their behalf, nor was the possession of the close given to the *plaintiff*, but it was retained by the *defendant*. On the 2d of *July*, the *defendant* told the *plaintiff* that he should not have the grass; and, afterwards, on that day, sold the grass to one *William Carter* for twenty-five guineas. The *plaintiff*, on the 12th of *July*, tendered to the *defendant* the sum of twenty guineas, for the crop; which the *defendant* refused to accept. The *plaintiff* went next morning to the *defendant's* close and finding the gate unlocked, sent in a person to mow the grass, who cut near half of the close. On the evening of the 15th, the *defendant* brought a letter from his attorney to the *plaintiff*, forbidding him to enter the close, and discharging

him from mowing the grass. A lock was then fixed upon the gate by the *defendants*, and *Carver*, by his direction, carried away the remainder of the crop. The question for the opinion of the court is, whether the *plaintiff* is entitled to recover.

1805.
CROSBY
versus
WASSWORTH.

ROUSE, for the *plaintiff*. "The sale of a standing crop of mowing grass, by parol, is valid, notwithstanding the statute of frauds; for it is not only not a sale of goods, but it is an executory contract, and something remains to be done to the commodity itself. It does not even exist in *solido*, at the time of the contract. It is not goods within the statute, for it goes to the heir, and not to the executor; *Cocks v. Gonzales*;* *Spence's case*,† *Waddington v. Bristow*.‡ It was not within the statute, for something remains to be done, namely, to cut the grass in order to render the commodity fit to be delivered.§ And as *Carver*, who took away the grass, acted under the authority of the *defendant*, though the soil did not pass by the agreement, yet the *plaintiff* might bring trespass *quare clausum fregit* against the *defendant*; for it will lie at the suit of one who is only the grantee of the vesture, or herbage of the land, though he has not the soil. *Co. Litt.* 4 (b); *Moor*, 355; *Dyer*, 285; *Wilson v. Mackreth*, *Bull. N. P.* 85, and *Burt v. Moore*.¶ Here the *plaintiff* entered, and took possession of the close under the agreement, for the purpose of cutting the grass; which entry could, therefore, not be *tortious*. Nor after his entry could the *defendant* revoke the grant of the liberty of possessing the close for the time, for the purpose of mowing. He therefore, contended that the *plaintiff* was entitled to recover upon both grounds."

* *Bull. N. P.* 34. † *Winch.* 51. ‡ 2 *Bos. and Pul.* 452, § *Towers v. Osborne*, 1 *Str. Rep.* 506. *Clayton v. Andrews*, 4 *Burr.* 2101. ¶ 5 *Term Rep.* 329.

1803.

CROSBY
versus
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READER, *contra*. "This is a contract void by the statute of frauds; and secondly, an action of trespass will not lie. It must be either a contract for the sale of goods, or for an interest in or concerning lands, and then, in either case, the contract not being in writing, is void, under the 4th section of that statute." He here also endeavoured to distinguish this case from that of *Waddington v. Bristow*,* and contended that the plaintiff's case fell within the 4th section of the statute 29 Car. II. c. 3. Whereupon

LORD ELLENBOROUGH, C. J. suggested that it might perhaps be considered as an interest in or demise of the land, during the time which would be necessary for the purpose of cutting the grass; for, as during that time he must have the exclusive right of possession, it might be *ex necessitate* considered as a lease, and then it would be a good lease by *parol*, being for less than three years. This led to considerable difficulties in the argument; and.

READER, in reply to this suggestion from the court, contended that it could not be a lease, because rent and also a distress and replevin were incident to a lease; and here was no rent reserved, but only a price agreed to be paid for the grass, with a liberty of entry for the purpose of mowing it.

ROUGH, in reply, argued again that it might be considered as a *parol* demise of the land, or *tenure* of the land for less than three years, and therefore was good under the exception in the statute of frauds.†

Cur. adv. vult.

* 2 Bos. and Pul. 452.

† Upon this point, respecting which there appeared to be a great difficulty, the editor has met with the following case which was not cited; "Si A. scitis ea fce GRANT pasturam del close, le close passe al pasture et nemy le pasture solmen; d'entre prise per ses avers; Car il avers clausum fregit. Mich. 14 Car. B.R. enter Mount joy et Tarderne, per curiam adjudge sur demurrer. Car la suit plead que A LEASE le pasture del close

Afterwards the judgment of the court was delivered to the following effect, by

1803.

CROSBY
VERSUS
WADSWORTH.

LORD ELLENBOROUGH, C. J. After stating the case. "If the *plaintiff* appears to be entitled to the exclusive possession of the land under the agreement during the proper period for cutting the grass, it appears he could maintain trespass for entering, and carrying it away.* This brings the case to the question whether the agreement by parol amounts to a lease of the land for the time, or is not wholly void under the statute of frauds.† We may lay out of the question the provisions of the 17th section relative to the sale of goods, for ten pounds or more. That section is not in any wise applicable to the case, for it is not a sale of goods and merchandizes, because the grass at the time of the agreement did not exist in the state of goods, wares, or merchandizes, which is taken by HEATH; J. in the case of *Waddington v. Bristow*,‡ as the true time with reference to which under this statute the agreement must be taken. Neither is this a lease for an uncertain interest within the meaning of the first section of the statute of frauds; for it is clear, that the 'law or usage' meant to be vacated by that section of the statute, relates to a *lease* of the same kind as that mentioned in the second, which it is clear means a certain legal interest under a rent reserved thereupon; neither of which requisites are to be found in this case, considering it as a *lease* for the time.¶ It next occurs to consider whether it is a

pur ans sans fait, et adjudge bon pur le raison arrendit. Intra-
tur Trin. 14 Car. Rot. 1291. Vide 2 Roll. Abr. 45, placit
21, line 10.

* Co. Lit. 4. b. et, al. † 29 Car. II. c. 3. ‡ 2 Bos.
and Pul. 455.

¶ These sections are as follows;

"All leases, estates, interests of freehold or terms of years,

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contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, with in the purview of the 14th section of the statute. That section only precludes the bringing any action to charge any person upon such contract, unless it is in writing, which description of action does not properly apply to this case. Such a contract may not, therefore, be wholly void; so that if it is once executed, it may be good; but yet in this case, being executory, and as the performance of it cannot be enforced by action, we think it may be discharged by any thing done in contravention of it; and as we think the act of the defendant was sufficient to discharge the execution of the contract, we are obliged to say that the plaintiff is not entitled to recover."

His lordship added, "Since the argument of the case, *Poulter v. Killingbeck* has been cited for the plaintiff; we think it has no material application. There A. agreed with B. to let him land rent-free, on condition that A. should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: A. declared in *indebitatus assumpsit* for a

or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto, lawfully authorized by writing; shall have the force and effect of leases and estates at will, only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding.

§ 2. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two third parts at the least of the full improved value of the thing demised.

moiety of the value of the crop sold to B. without stating the special agreement; and I wonder how this could ever be thought an interest in lands.

Judgment for the DEFENDANT.

SORSBIE and others against MUNRO and others, Commissioners of the Customs. Friday, June 21st.

By stat. 44. Geo. III. cap. 10, s. 2, a bounty is given upon the importation of foreign corn to be regulated according to the average prices, ascertained according to the provisions of the act, in London, which shall be published in the London Gazette in the third week after the entry of the said corn upon which the bounty is claimed; held, that if there is no average price published in the Gazette in the third week, no bounty is payable.

THIS was an action upon the case brought by the plaintiff to recover of the defendants the bounty upon the importation of 698 quarters and 7 bushels of foreign rye, imported in the *Jonge Norman*, from *Riga*, into the port of *Newcastle*. The cause came on to be tried before Lord ELLENBOROUGH, C. J. at the sittings in *Middlesex* after *Hilary* term, 1804, when the opinion of the court was reserved upon the following case; viz. that the defendants at the time when the cause of action accrued, were and are commissioners of the customs; that on the third of *August*, 1801, the plaintiffs imported in a British ship into the port of *Newcastle upon Tyne*, 698 quarters and 7 bushels of foreign rye; and that each quarter was of the weight of 408lbs. avoirdupois; that *Charles Ogle* was at the time of the importation collector, and *Robert Page*, comptroller of the customs of the said port: that the plaintiffs on the 18th of *September*, 1801, sold the said rye, and made proof on oath before *Charles Ogle* and *Robert Page*, being then principal officers at that port, of the day of such sale; and that the said sale was a fair and bona fide sale; and that there was not any fraud or

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collusion in the said sale for the purpose of obtaining the bounty; that on the said 3d day of *August*, a due entry was made with *Charles Ogle* and *Robert Page*, being the proper officers at the port of *Newcastle*; and that *Charles Ogle* and *Robert Page*, then being collector and comptroller of the said port, received full and satisfactory proof that the said rye was wholly and entirely without mixture of any other corn or grain; that on the 22d of *August*, 1801, before the said rye was delivered out of the charge of the proper officers of the said port, the same was carefully examined, inspected, and weighed by *Daniel Greenwell* and *John Coulter*, being officers of the customs directed by the commissioners of the customs for that duty, and *John Huntingdon* and *William Pollard*, being two indifferent and disinterested persons, experienced in the nature of the said article, appointed by *Charles Ogle*, collector, and *Robert Page*, comptroller of the customs in the said port. That such officers and persons viewed the same, and weighed such proportions thereof as they thought sufficient for ascertaining the average weight thereof, and certified and declared upon their corporal oaths, first administered by the said *Charles Ogle*, collector of the customs of the said port, that the said rye was merchantable, and of the weight required by the act; and that the officers and persons, after such inspection, on the 22d of *August* 1801, granted such a certificate, that the said rye was merchantable and of the weight aforesaid; that no average price ascertained according to the provisions of the act of foreign rye in *London* was published in the *London Gazette*, in the third week after the said entry; that the average price of foreign rye, so published in the second week after the said entry, according to the act, was 63s. per quarter, and that a bounty equal to the sum by which the said price is less than 65s. per quarter, on the said quantity imported, amounts to 6s.

1805.

Sons of
and Others
versus
Mynro
and Others.

17s. 9d. whereof the *defendants* had notice, and that no part of that sum has been paid, and that the average price of foreign rye so published in the fourth week, after the said entry, according to the said act, was 38s. per quarter; and that a bounty equal to the sum by which the said price is less than 65s. per quarter on the said quantity imported amounts to 929l. 9s. 7½d. whereof the *defendants* had notice, and that no part of that sum had been paid. The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover any, and what sum of the *defendants*. If the court are of opinion that the *plaintiffs* are so entitled, the verdict is to be entered for the *plaintiffs*, for such sum as the court shall think them entitled to; if otherwise, a nonsuit to be entered.*

* The clauses of the act 44 Geo. II. cap. 10, upon which this question arose, were as follows, viz.

§ 2 That the several and respective bounties, granted by this act upon wheat, barley, rye, oats, pease and beans, and upon the meal of barley, rye, and oats respectively, shall be regulated and paid according to the respective average prices, ascertained according to the provisions of this act, of foreign wheat, barley, rye, oats, pease, and beans, in *London*, which shall be published in the *London Gazette*, in the third week after the entry of the wheat, barley, rye, oats, pease, or beans, or any such meal, as aforesaid, upon which any bounty is claimed under this act.

§ 9. That the said inspector of corn returns shall duly and regularly enter into a book or books, to be provided and kept for that purpose, the several accounts of quantities and prices of foreign corn, grain, and pulse, received by him by the respective corn factors or importers, and the same shall not be made public or shewn by the said inspector, or with his privy or consent to any person whatsoever, unless the same shall be called for, or required by the receiver of corn returns, or shall be required by any order in writing under the hand of the Lord Mayor, or any two of the aldermen

1843.
 SOLEMAN
 and Others
 versus
 MOONZ
 and Others:

MOONZ, A. for the *plaintiffs*. "It is stated in the case that no average price was published in the *Gazette*,

of the said city, or the commissioners of his Majesty's customs, or any two or more of them under the penalty and forfeiture of the sum of ten pounds.

§. 9. That the said inspector of corn returns shall, and he is hereby required, every week to make up, compute, and distinguish from the returns by him received, pursuant to the directions of this act, in that week, the general aggregate quantity, and the price of each respective sort of foreign corn, grain, or pulse, that shall have been returned as examined, and certified, and sold and delivered in and during the week for which such returns shall have been made as aforesaid, in the city of London, and suburbs thereof: and shall keep in a distinct book the entries of all returns of corn, grain, or pulse, that shall have been returned as certified for the purpose of bounties being paid thereon, under this act, from all other foreign corn, returned to such inspector, under an act passed in the thirty-first year of his present majesty's reign: and the said inspector of corn returns shall make up and compute the average prices of each respective sort of such corn, grain, or pulse, sold and delivered during such week, from such corn, grain, or pulse only as shall have been certified for the purpose of bounties, being paid thereon pursuant to the provisions of this act; and he is hereby directed, on the *Friday* in every week, to transmit a copy of the account of the said average prices to the receiver of corn returns, who is hereby required to enter the same into a book or books to be kept for that purpose, and forthwith to transmit a certificate of such average prices of each respective sort of foreign corn, grain, or pulse, signed by him, to his majesty's collector, or other chief officer of the customs of the port of *London*; and cause a copy thereof to be hung up in some public place in the custom-house to which all persons may resort; and the payment of the bounties herein before granted shall be governed and regulated by such average prices in the manner herein before directed, *until new average prices shall be made up and computed in manner by this act directed; and such*

in the third week after the importation; but every thing was done on the part of the *plaintiffs* to entitle them to the bounty."

LORD ELLENBOROUGH, C. J. "There was no price found for them in the *Gazette*, and can we supply it? You are shut out by the express words of the case, for you cannot refer to the second week, when the legislature has said it shall be referred to the third week."

MOORE. "By the 9th section, the payment of the bounty shall be governed and directed by the last average prices (in the manner therein before directed) until a new average price is made up and computed in a manner by the act directed;" therefore, if there is no average price in the third week, that of the second may be considered as the price of the third. He then contended, that the average price gazetted in the fourth week must be taken to have been the average price of the third week; but he stated that in fact there was no average price of the third week, because there was

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and Others
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and Others.

receiver of corn returns shall also cause the same to be published in the *London Gazette* on every *Saturday* night, and shall also transmit the same to the several and respective collectors, or other chief officers of the customs, at the several ports in this act described, and the said respective collectors and other chief officers, are hereby required to receive and enter the same in a book or books to be kept for that purpose, and to cause a copy thereof to be hung up in some public place in the custom-house thereto belonging, to which all persons may resort; and the payment of the said bounties, at every such port shall be governed and regulated by such average prices in manner herein before directed, until new average prices shall in like manner be made up and computed, and a certificate thereof shall be transmitted to such collectors or chief officers respectively, and be by them received.

1805:

SERRIS
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and Others.

no rye sold in that week; and therefore no average price could be made up."

THE COURT held that the 9th section applied only to the regulation of the officers and collectors, but did not confer the right to the bounty; and that as the clause which gave the bounty required that the average price should be *gazetted*, if there was a failure in that particular, from whatsoever cause, the *plaintiffs* could not be entitled by law to demand the bounty.

JUDGMENT FOR THE DEFENDANTS.

DOE on the demise of BROMFIELD and MARY his Wife against SMITH, Widow.—Friday, June 21st.

Agreement "to let to A. a house, at a yearly rent, to continue during the life of the lessor, supposing it to be occupied by the lessor himself, or a tenant agreeable to the lessor;" held, that no interest passes, under a lease to be made under this agreement, to the executors, but it must be a lease for the life of the lessor, if the lessor occupies himself, or by a tenant agreeable to the lessor; and that upon his death the lessor may eject the executor without a notice to quit.

DOE, dem.
BROMFIELD
versus
SMITH.

THIS was an action of *ejectment*, which came on to be tried, before Mr. Justice Grose, at the last assizes for the county of Derby, when a verdict was taken for the *plaintiff*, subject to the opinion of this court on the following case:

The *plaintiff*, Mary Bromfield, being under coverture, and entitled to the premises in question, and having full authority for that purpose, entered into the following *agreement* in writing with William Leaper Smith, the husband of the *defendant*.—"3d of March, 1778, agreed this day to let to Mr. Smith, my house, situate in the wardwick, Derby, at the yearly rent of thirty guineas, he paying the taxes; also an enclosure, called the *Gallows Intack*, at the yearly rent of 7l.—

The above agreement to continue during my life, supposing it to be occupied by himself, or a tenant agreeable to me. A clause to be added in the lease, to give my son a power to take the house for himself, if he chuses, when he comes of age."

1803.

DOZ, dem.
BROMFIELD
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No other lease was ever prepared in pursuance of it. The said *William Leaper Smith* took possession of the premises, and occupied them himself, under the agreement, till his death, on the 19th of *November*, 1803, and paid the rent and taxes. The *defendant* is his widow and executrix, and has continued to occupy the premises since his death.

The *question* for the opinion of the court is, whether the *plaintiff* is entitled to recover.

Upon the case being first read, Lord ELLENBOROUGH, C. J. observed, that there was no question in it, because the *defendant* could not have a legal interest merely by the agreement; for it was only an agreement for a lease, and the parties expressly state that something more is to be done, in order to carry their agreement into effect, namely, the executing of a lease.— Upon this, CLARKE, for the *defendant*, contended, that as the *defendant's* husband, the tenant, entered with the consent of Mrs. *Bromfield*, the *lessor*, he had an estate at will, or from year to year, which could not be determined without notice, and it did not appear upon the case, that any notice was given. *Wherefore* it was, as it seemed, the intention of the court that the case should be restated.

But at length, being confident that he could support the case for the *plaintiff*, even without a notice to quit,

READER, for the *plaintiff*, argued as follows. "There is no *tenancy* between the *lessors* of the *plaintiff* and the *defendant*; for the demise being under this agreement,

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if a lease had been granted pursuant to it, it would have terminated with the life of the testator. For he was to hold it on the terms of keeping the premises himself, or by a tenant agreeable to her; and he was not to assign without her approbation. If he had assigned in his life-time, without Mrs. Bromfield's approbation, she might have maintained an ejectment; and the other words 'or a tenant agreeable to me,' can make no material difference, in case of his death. These must still be the terms of the tenancy; for if it is only an agreement, then, even in equity, it can only create a tenancy subject to those terms. And that this is a legal condition is clear from the case of *Doe v. Colliers*,* and also from *Dyer*, 179.

CLARKE, N.G. *contra*. "Even if *Smith*, the testator, had assigned, and without license, he might have insisted upon a notice to quit; and therefore, his executrix may do so also. The argument for the *plaintiff* presupposes that this is a lease for the joint lives of Mrs. Bromfield and Mr. Smith; but it is not so; it is a lease for the life of Mrs. Bromfield, with a covenant not to assign without license. But such a lease is neither a lease for the joint lives of the lessor and lessee, nor a lease determinable upon the death of the lessee. Taking this to be the construction of the lease to be granted, Mrs. Smith, the *defendant*, is not an assignee within the meaning of such a covenant not to assign; and if it had been let to a tenant with the consent of Mrs. Bromfield, the *defendant*, as executrix, would have been liable to pay the rent."

LORD ELLENBOROUGH, C. J. "Are there not covenants in leases, that the occupation shall not be departed with? And ought you not to have executed a lease and counterpart, in as large words as these. Now if the tenant must be a person agreeable to her,

* 2 Term Rep. 133.

might not that exclude the executrix, as well as any other person not agreeable to her? The cases which you allude to are upon the effect of the word *assigns*, in ordinary leases."

1805.
Dox, dem.
BROMFIELD
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SMITH.

CLARKE. "A lease to a man for years includes a lease to his executors; and although the agreement stated by your lordship may be good in law, yet it may not be the effect of the agreement in this case. There is a case in *Croke Eliz.* 643, where a lease was made to a man for twenty-one years, if he should so long live, and in the service of the lessor; the lessor died within the term, and the court held that the service determining by the death of the party, the lease was absolute for the term. This is, at least, not a void lease, but the lessor might continue it; and, being voidable, there should have been an entry by the lessor."

LAWRENCE, J. "What, if the executrix is become tenant? And, if not, what is become of the estate and interest of the lessee?"

CLARKE. "If *Smith* had been desirous of getting rid of this lease, he could not have done so by merely discontinuing to occupy; but the lessor might have compelled him to pay rent. Though he is not a lessee, the *defendant* is entitled to notice to quit. This is a lease for the life of Mrs. *Bromfield*, with an agreement not to assign or underlet; and the possession of the executrix is not the possession of an assignee; and lastly, there ought to have been an entry, because the lease is not void, but voidable."

READER, in reply. "The case in *Croke Eliz.* is very distinguishable; that was a case of forfeiture, and one of the judges was strongly against it, for it was a limitation of the estate that it should not continue longer than he served the lessor; but this is decided otherwise now, for it is clear, that if there was a lease, to be

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void if the leasee should depart with it, or cease to occupy, it would not go to the executor. If it was only a forfeiture, it would be necessary to have an actual entry; but here the interest of the tenant actually expires, and no entry is necessary."

Lord ELLENBOROUGH, C. J. "This is only an agreement for a lease, and not a present demise. But, as there has been a holding under it, though no lease has been actually executed, it still comes to the question of what interest the lessee would have taken under such a lease, supposing it to have been granted. Now, the interest of *Smith* would have been an interest during the joint lives of *Mrs. Bromfield* and himself, the words of the agreement being to let to *Smith*, 'to continue during her life, supposing it to be occupied by himself or a tenant agreeable to me.' These are words making a condition; and I consider them as providing, that, during his life, he should either continue to occupy personally, with which occupation she was satisfied, having a personal confidence in him, or that he should occupy by some one who might be agreeable to her. But it does not amount to the conveying of an interest to pass to executors neither to those of the lessor by express terms, nor of the lessee by necessary implication. If so, this lease determined with his life, and of course the ejectment is well brought. It might be another question, whether it would be necessary to give notice, if it continued to his executors; for if an interest passed to them, perhaps the lessor of the *plaintiff* could not give notice to quit. But I consider it as a demise for the life of *Mrs. Bromfield*, determinable upon *Smith's* own life, if he should occupy it himself, or by a tenant agreeable to her."

GROSE, J. "The words are very strong in this case; 'during my life, supposing them to be occupied by himself, or a person agreeable to me.' There must

therefore be no person to occupy them except himself, or some persons that she had agreed to; and there is no pretence to say that these persons are such as are agreeable to her, for she has brought her ejectment."

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Dor. dum.
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LAWRENCE, J. "My attention, upon reading the case, was not directed to the point which has been argued; the question is only whether or not the party can recover. Yet it is a question, as I think, of construction, and I do not think the bringing of an ejectment without notice alters the question. I doubt, indeed, whether, if any interest passed to the executrix, the lessor of the *plaintiff* could bring an ejectment: for if an interest passed to the executrix, she must occupy, as he, *Smith*, would have done. I consider this as if the interest of *Smith* ceased with his life; for by the former words, *during my life*, it would be an estate for her life, if nothing were added to qualify it; but it goes on to say, supposing it to be occupied by himself or a tenant agreeable to me. And the question is, if this was an application made to a court of equity to compel a specific performance of the agreement, whether the lease to be granted should be a lease absolutely with a proviso of re-entry, or whether a lease could not be so drawn as to give effect to the true intention of the parties, passing an interest during the joint lives of the lessor and lessee, upon condition that the lessee, or some person equally agreeable to the lessor, should occupy."

JUDGMENT FOR THE PLAINTIFF.

WILLIAM HOLWELL CARR, an Infant, *against* the
EARL OF ERROL and Others.

A. devises to B. and T. in fee, in trust to the use of W. H. for life, second son of his daughter E. subject to a proviso after mentioned, remainder to trustees, to preserve, &c, during his life; remainder to his first and other sons in tail male, subject as aforesaid; remainder to the second and other sons of E. in like manner; remainder

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to the second son of E.'s first son; remainder to A.'s granddaughter C. H. for life, subject as aforesaid; remainder to trustees to preserve, &c. remainder to her first son in tail male; remainder over, subject to the said proviso, that if W. H. or either of the remaindermen should become earl of E. the use to such person and his issue male should cease, as if such person were dead without issue. E. has two sons at A.'s death, viz. Lord E. and W. H. who is in possession of the estate devised. Held, that upon W. H. becoming earl of E.; W. C. the first son of C. H. is immediately intitled to an estate in tail male in possession, as he would be intitled in case W. H. were then actually dead without issue.

SIR William Carr, baronet, by his will, duly executed, dated 19th of October, 1776, reciting that by indenture of the 2d of January 1762, all his real estates in the county of Northumberland were limited to his brothers *George and Robert Carr*, their executors, &c. for a term of 1000 years, upon trusts which were then become unnecessary, directed that the said term should cease, and that his brother *Robert Carr* (the surviving trustee of the term) should, after his (the testator's) decease, surrender the same, so that it might be merged; the sum of 3000*l.* mentioned in the said indenture having been paid, and the provisions made for his two daughters, the Countess of *Errol* and *Mrs. Margaret Mackey*, on their respective marriages, and the devises thereafter made for them being by him intended to be in lieu and full satisfaction of 5000*l.* mentioned in the said indenture, and also for all estates, &c. secured for his said daughters by his marriage settlement. Then, after directing that all his plate, furniture, &c. at his mansion-house at *Etal* (in Northumberland) should remain there as heir-looms, he devised the same to his said brother *Robert Carr*, and *Henry Collingwood*, their executors, &c. upon trust, to permit the same to go, together with the said mansion-house, to such person or persons as should from time to time, under his will, become entitled to it, for so long time as the rules of law and equity would permit. And desired that an inventory might be taken

of the goods by the trustees. And then devised all his real estates whatsoever and wheresoever unto Sir *W. Blackett* and *W. Travelyan*, and their heirs, to the use of the said *R. Carr* and *H. Collingwood*, their executors, &c. during the term of 1000 years, upon the trusts after mentioned, and from and after the end or sooner determination of the said term of 1000 years, and subject thereto, to the use of his grandson *William Hay*, second son of his daughter the Countess of *Erroll* for life, without impeachment of waste, but subject to the provisions and conditions thereafter contained; and after the determination of that estate in his life, by forfeiture or otherwise, to the use of the trustees and their heirs during the life of *William Hay*, in trust, to preserve the contingent uses thereafter limited, but to permit *William Hay* during his life to take the rents and profits; and after the decease of *William Hay*, to the use of the first son of the body of the said *William Hay*, and of the heirs male of the body of such first son, but subject to the provisoes and conditions thereafter contained; and in default of such issue, to the use of the second, third, fourth, and other sons of the body of the said *William Hay*, severally, successively, and in remainder, one after another in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, but subject to the provisoes and conditions thereafter contained; and in default of such issue, to the use of the third, fourth, fifth, and every other son and sons of the body of his said daughter the Countess of *Erroll* lawfully begotten, or to be begotten, severally, successively, and in remainder, one after another, in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, but subject to the provisoes and conditions thereafter contained. And in default

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of such issue, to the use of the second son of the body of his grandson *George Lord Hay*, and of the heirs male of the body of such second son; but subject to the provisos and conditions therein contained: and in default of such issue, to the use of the third, fourth, fifth, and other sons of the body of the said *George Lord Hay*, severally, successively, and in remainder, in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons; but subject to the provisos and conditions thereafter contained. And in default of such issue, to the use of his granddaughter *Lady Charlotte Hay*, (afterwards *Lady C. Carr*), for life, without impeachment of waste; but subject to the provisos and conditions therein after contained: and after the determination of that estate in her life-time by forfeiture or otherwise, to the use of the trustees and their heirs during the life of the said *Lady C. Hay*, in trust, to preserve the contingent uses thereafter limited, (but to permit her during her life to receive and take the rents and profits:) and, after her decease, to the use of the first son of her body, and of the heirs male of the body of such first son; but subject to the provisos and conditions thereafter contained; and in default of such issue, to the use of the second, third, &c. and other sons of the body of the said *Lady C. Hay*, severally, successively, and in remainder, one after another in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons; but subject to the provisos and conditions thereafter contained, and in default of such issue, to each of the said testator's other granddaughters by name, being eight in number, sisters of the said *Lady Charlotte Hay*, for their respective lives in like manner, and with the like limitations to trustees to preserve contingent

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remainders, and to each of their first and other sons severally and successively in tail male, with remainder in fee to his said daughter the Countess of Erroll. And as concerning the said term of 1000 years so limited to the said *Robert Carr* and *Henry Collingwood*, upon trust to permit his said daughter the Countess of *Erroll*, in case his said grandson *W. Hay*, and every other person to whom an estate for life or in tail was thereinbefore limited, should so long be under the age of 23 years, to occupy and receive for her own use the rents and profits of his said capital mansion-house, with certain lands therein particularly described, she taking care of the plantations and keeping the house in repair; and upon further trust that in case his grandson *William Hay*, or any other person to whom an estate for life or in tail was thereinbefore limited, should attain the age of 23 years in the life-time of his daughter *Lady Erroll*, then the trustees should put the said *William Hay*, or such other person attaining the age of 23 years into the possession and receipt of the rents and profits of the said capital mansion-house and grounds, and that from and after such possession taken the said term of 1000 years should determine; and in such case he directed that his grandson *William Hay*, or such person as from time to time should be in possession of his real estates under his will, should pay to his daughter *Lady Erroll* an annuity of 400*l.* for her life to be issuing out of all his lands; and upon further trust that in case *Lady Erroll* should die before his grandson *William Hay* or other person entitled, &c. should have attained the age of 23 years, then the trustees should let the said mansion-house and grounds until such event happened, and that in the mean time the rents and profits should be applied by the trustees to the increase of the funds and for the purposes therein after mentioned. And as to the said term of 1000 years with respect to all the other testator's real estates, upon

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trust that the trustees should, after his decease, receive the rents and profits thereof, until by the interest of the rents and profits, and by his ready money securities, a fund should be raised sufficient to pay his debts, legacies, and also the annuities thereafter provided for his daughter *Margaret Mackey*, his sister *Jane Carr*, and his said grandson *William Hay*, which payments the trustees were directed to make, (viz.) to his daughter *Margaret Mackay* an annuity of 360l. and to his sister *Jane Carr* a like annuity of 60l. for her life; and that there should be paid out of the said fund for the use of his grandson *William Hay* the several yearly sums therein mentioned, until he should attain the age of 23 years; and he further directed, that after a fund sufficient to pay his debts, &c. should have been so raised, the said trustees, in case his daughter *Lady Erroll* should be then living, and his grandson *William Hay*, or other persons entitled, &c. should then be under the age of 23 years, should permit *Lady Erroll* to receive the rents and profits of the said real estates until his said grandson or such other person as aforesaid should attain the age of 23 years, and no longer. And that in case at the time when a fund sufficient to pay his debts, legacies, and annuities should have been raised, his daughter *Lady Erroll* should be dead, and his grandson *William Hay* or other person entitled as aforesaid, should be under the age of 23 years, then the trustees should receive such rents and profits until his said grandson or other person entitled as aforesaid should attain the age of 23 years, and place out the money at interest, and pay and transfer all the said monies and securities to his said grandson, or such other person as last mentioned at the age of 23 years; provided also, that when all the trusts of the said term of 1000 years should be performed, then the said term should determine. The will also contained a proviso empowering

William Hay, when in possession of the estates, to jointure a wife with a rent-charge not exceeding 80*l.* a year for every 1000*l.* he should receive with her. And also another proviso empowering *W. Hay* and Lady *C. Hay*, and the other tenant for life, when in possession, to grant leases for any term not exceeding 12 years, at the most improved yearly rents, and under such conditions as therein mentioned; and also another proviso, declaring that the said premises were so devised and limited to his said grandson *William Hay* for life, and to his first and every other son, and the heirs male of their respective bodies; and to the third and every son of his daughter Lady *Erroll*, and the heirs male of their respective bodies; and to the second and every son of *George Lord Hay*, and the heirs male of their respective bodies; and to Lady *Charlotte Hay*, and to his other granddaughters by name, for their lives, and to their respective first and every other sons, and the heirs male of the respective bodies of such sons, upon express condition, that within six months after they should respectively come into, and while they continued in possession of the premises, they should take the surname and bear the arms of *Carr*; or the person refusing or neglecting so to do, should not take any benefit, estate, or interest under his will, but the next in remainder should take, &c. as if the person so refusing was actually dead; provided that such person in remainder so taking, &c. should assume and continue to bear the surname and arms of *Carr*, in manner aforesaid. The will also contained the following proviso; provided further, that it is my express will and meaning that in case my grandson *Wm. Hay*, or his first or any other sons, or the issue male of their respective bodies, and the third or any other son of my daughter Lady *Erroll*, or the issue male of their respective bodies, or the second or any other son of *George Lord Hay*, or the issue male of their respective

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bodies, or my granddaughter Lady Charlotte Hay, &c. or their respective first or any other sons, or the issue male of their respective bodies, or any of them, shall at any time hereafter become entitled in possession to the premises hereby devised, by virtue of the limitations aforesaid, and the said person or persons become so entitled, shall then, or at any time afterwards, be or become entitled to the title of Earl of *Errol*, or Countess of *Erroll*, or any higher title which my son-in-law, the now Earl of *Erroll* or heirs may hereafter become entitled to, then and in every such case and from henceforth, the use and estate hereby limited to every such person or persons so being or becoming entitled to the said title or any higher title as aforesaid, and to his, or her, or their respective sons or issue male, of and in the said hereby devised premises, and every part thereof, shall cease, determine, and be utterly void to all intents and purposes whatsoever, as if such person or persons was or were dead without issue of his, her, or their respective body or bodies; and in every such case the said hereby devised premises shall go and remain to, and to the use of, and shall be immediately vested in the person or persons who by virtue of the limitations aforesaid, should be next in remainder to such person or persons, so become entitled as last-mentioned, in case he, she, or they was or were dead without issue male of his, her, or their bodies. The testator appointed his daughter, Lady *Erroll*, executrix, and he afterwards made a codicil, which did not affect the disposition of his real estates, and died in 1777, leaving Lady *Errol*, who proved the will, and *Margaret Mackey*, now *Farquharson*, his daughters and co-heiresses at law. At the time of the date and execution of the will, and of the death of the testator, his daughter, Lady *Erroll*, had issue two sons, and no more, viz. the said *George Lord Hay*, her eldest son, then under age, and the said *William*

Hay; but in 1778, she had issue a third son, *James Hay*, who died in 1797, at the age of nineteen years. At the decease of the testator, *William Hay*, the second son of *Lady Erroll*, was an infant, five years old, and consequently the trustees of the term of 1000 years; or the Earl and Countess of *Erroll*, with their concurrence, entered into possession of the testator's mansion-house, with the heir looms therein, and into the receipt of the rents and profits of all other the real estates, of which the testator was seised at the time of his death, and they or one of them continued in such possession and receipt until 1795, when *William Hay*, having attained his age of twenty-three years; and the several sums directed to be raised under the trusts of the term of one thousand years, having been satisfied, was let into possession of the mansion-house, with the heir looms and furniture therein, and into the receipt of the rents and profits of all others the testator's real estates. *James Earl of Erroll*, the husband of the testator's daughter, *Lady Erroll*, died in 1778; and at his decease, *George Lord Hay*, his eldest son and heir at law, became Earl of *Erroll*. In 1798, *George, Earl of Erroll*, the testator's grandson, died without issue, leaving *William Hay*, his brother and heir at law, who thereupon became and now is Earl of *Erroll*. At the death of *George, Earl of Erroll*, *Isabella, Countess of Erroll*, the testator's daughter, not having any issue male, except *William*, now Earl of *Erroll*, and his eldest son, *James Lord Hay*, *Lady Charlotte Hay*, who had intermarried with *William Holwell*, clerk, who afterwards took the name and arms of *Carr* by virtue of his majesty's license, granted to him and his heirs, claimed to be entitled to the possession of the estates by virtue of the last-mentioned proviso, in the same manner as if *William Hay*, now Earl of *Erroll*, was dead without issue male; but *Lady Charlotte*, and her brother, the present Earl,

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agreed that he should continue in the receipts of the rents and profits of the estates, and that the rents should be divided equally between them, and which was so done to the time of the death of *Lady Charlotte Carr*, which happened in *February*, 1800, when she left an only son, the present *plaintiff*; then above a year old. It being considered on the part of the infant that by virtue of the proviso in the testator's will, he became entitled on the death of his mother to the rents and profits of the estates, as tenant in tail, under the limitations of the will of the testators, a bill in *Chancery* was filed in *Easter* term, 1801, in the name of the *plaintiff*, by his next friend, against the parties, stating the matters aforesaid, and praying that the *plaintiff* might be declared, in the events that had happened, to be entitled to the heir-looms, and the real estates of the testator, devised by his will, and that *William*, Earl of *Erroll*, might be decreed to deliver up possession thereof; and for further relief. To this bill the *defendants* put in their answers, and admitted the facts generally stated in the bill, and particularly the will of the testator, and the death of *George*, Earl of *Erroll*; without issue, and that thereupon the *defendant*, the present *Earl*, succeeded to the title and estate of his brother; but the *defendant*, the Earl of *Erroll*, insisted that the real estates of the testator were vested in the trustees to preserve contingent remainders, for the benefit of himself during his life. A receiver was appointed to collect the rents and profits, and pay them into the Bank without prejudice; and a case was directed to be made by the *Lord Chancellor*, for the opinion of this court, upon the question whether the *plaintiff*, *William Holtwell Carr*, was under the will of the testator, *Sir William Carr*, entitled at law to any and what estate in possession, in the premises in question, subject to the trusts of the term of 1000 years created by the will of the testator.

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DAMPIER, for the *plaintiff*. " This case depends upon the construction of the *proviso* annexed to each estate-tail; whether the *plaintiff* is entitled thereby in the event which has happened to an estate-tail in possession, as if *William Hay* were actually dead without issue. In the case of *Doe d. Heneage v. Heneage*,* A. devised to his son B. for life, remainder to trustees to preserve contingent remainders, nevertheless to permit B. to receive the rents and profits; remainder to the first and other sons of B. in tail-male; remainder to C. with a proviso, that if B. should succeed to the estate of D. the limitation of A.'s estate should cease; and the next in remainder should take as if B. were dead: B. succeeded to D.'s estate before he had a son; and it was held that the limitation to the trustees continued during the whole of B.'s life, so as to support the contingent remainders. But the intent of the testator would have been defeated, unless this construction had been put upon the will, for *G. T. Heneage* would have taken as heir the estate devised, and also the estate of D. his uncle under his will. So that both estates would have vested in this eldest son, contrary to the intention of the testator. It is not necessary to inquire how the profits must be applied, but it will appear that, if this construction, that the estate goes to *W. H. Carr*, is not put upon the will, the testator's intention will be wholly defeated. For supposing the estate of the trustees, to preserve contingent uses, to be a vested estate, the remainder over cannot now vest in possession, and then *Wm. Hay*, a mere tenant for life, though he is Earl of *Erroll*, will have the benefit of the estate; yet if he had been tenant in tail, his estate would have ceased by the *proviso*, just as if he was dead. It is absurd, therefore, to suppose that this could be the

* 4 Term Rep. 13.

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testator's intention. The effect of the proviso is, that on any person who takes the estate becoming Earl of *Erroll*, the estate shall go as if he were actually dead. Now if the *Earl* were actually dead without issue, there could be no doubt but the infant *Carr* would be entitled to an estate-tail in possession, and is therefore entitled to recover now. Not to give this construction to the will would be to alter the words, and to read as if it were, "shall go to the person who is not next in remainder."

LORD ELLENBOROUGH, C. J. "You read the will as if the words were *beneficially* next in remainder."

DAMPIER. "If the *defendant* were *actually* dead, the trustees would not be next in remainder. The words of the proviso in *Heneage v. Heneage* were, 'the next in remainder, according to the uses of this my will, shall take as if G. T. H. &c. was or were respectively dead.' In this will the two clauses of the proviso, the one which states the contingent event and the other which designates the person to take the estate, are connected, and must be taken together, to explain each other; and *William Hay* cannot be considered as naturally dead, for the purpose of his estate ceasing, and yet not naturally dead, in order to give him the *profits* of the estate."

LAWRENCE, J. "You argue as if Lord *Erroll* is *certainly* to have the profits. Can that be a question for us, in a court of law?"

DAMPIER. "Although this court has nothing to do with the trusts upon the legal estate, this argument still holds to shew that by such a construction of the will, the intent of the testator must be defeated. The Earl of *Erroll* is to lose the estate, because he is taken to be *dead*; then how can the trustees take it, who are only to have it in case he is living.* It may be

* Lawrence, J. here hinted that it might be like the case of a monk possessed.

said indeed that the estate to the trustees is not made subject to the proviso as the other estates are; but then it may be answered that in effect it must be; though in case of forfeiture, the estate to the trustees might have vested. But this proviso is not merely to take the estate from him beneficially, but to take it from him as if he were dead; and the estate not going to the trustees, follows from the proviso, not; indeed, from the words expressed, but from the whole effect of the will. It may be contended, perhaps, that this could not be the meaning of the testator, because of the intervening remainders to Lord Erroll's third, fourth, and other sons, which it is the object of this estate to the trustees to support. But that is not the testator's main intent, for when he says the next in remainder shall take as if he were naturally dead, he does not regard so much who is next in remainder; he looks to prevent the union of the title with this estate, and considers the tenant for life as actually dead the moment the title devolves upon him."

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HOLROYD, *contra*. "The question is not what estate the Earl of Erroll has, but what estate *W. H. Carr* has, and whether he has any; and it is immaterial for the purposes of this case to consider what is to become of the trust of the estate in the trustees to preserve contingent remainders. Though the intent of the testator may be carried into effect in one respect by the construction contended for on the part of the *plaintiff*, yet it will be defeated in another. The devise to the trustees is not subject to the *proviso* of limitation, as the first devise for life and the subsequent devises in remainder are. All the contingent remainders would be destroyed according to the construction of the *plaintiff's* counsel, and also the devise to the third

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son of Lady *Erroll*, if she had one, for the estate is only given to the son of Lady *C. Hay*, afterwards Lady *C. Carr*, in case of a total failure of issue male of the Countess of *Erroll*. For the purpose of preventing which, in every case where there is an estate to trustees to preserve contingent remainders, the proviso is omitted."

LAWRENCE, J. "I do not feel the force of that argument; because he could not contemplate the event of the trustees becoming Earls of *Erroll*."

HOLROYD. "It is not necessary to have the proviso in that respect; but where the testator has this proviso in contemplation, he expressly mentions all the estates which shall be liable to it; and unless we consider the proviso itself as revoking the devise to the trustees, though it is not annexed to their estate, this devise must stand."

LE BLANC, J. "Suppose the proviso had been annexed to the limitation to the trustees?"*

HOLROYD. "It might then have been argued that the limitation to them was forfeited. But though what

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LORD ELLENBOROUGH, C. J. "Would it not have happened just the same (namely, that the remainder to the subsequent issue of the Countess Dowager of Erroll would be defeated,) if *William Hay* had actually died during her life?"

HOLROYD. "Here are two distinct intentions; one cannot take effect with the other; but the principal intent was that the estate should not go over, but continue in a certain line, and that intent will be defeated."

LORD ELLENBOROUGH, C. J. "What is his prior intention? Is it not that the estate should never unite with the Earldom of *Erroll*? There is indeed another intent, that the estate should not go to the female line until the male line is extinct. But how can we say which had the testator's preference? and in that case we must be governed by the words of the will. There may be indeed an intent so manifest as to overleap all words, however strong, but it must be most manifest."

HOLROYD, having before referred to *Roe v. Dodson v. Grew*, and Lord C. J. *Wilmot's* opinion thereupon,* said, that the case of *Doc v. Heneage* was a direct authority, but that the present case was stronger. There none of the limitations were expressed, which should be subject to the proviso; but the proviso came last, and was generally applied to all the devises.

DAMPIER, in reply. "It was not necessary to subject the estate of the trustees to this proviso. For, as their estate is to go over as in case of the death of the person taking the earldom of *Erroll*, it could never vest in the trustees, to preserve contingent remainders."

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strong authority, and out of respect to the learned and noble judge, who presided at the determination of that case, it deserves at least some consideration."

And afterwards, the court certified that the lessor of the plaintiff took an estate in tail male subject, &c. by virtue of the proviso in the above will.*

The KING against the Honourable ROBERT JOHNSON.—July 1.

In an indictment for a libel in England, the defendant cannot plead that there are and were before the union, courts competent in Ireland, to the trial of offences, and that he was born and commorant there at the time of the publication of the supposed libel; for this plea does not shew a jurisdiction in any other court, and is a mere not guilty.

[THIS was an indictment against the defendant, one of the judges in the court of common pleas in Ireland, for a libel which had been published here in England, in Cobbet's Weekly Register, in letters upon the affairs of Ireland under the signature of Juvenera, and which conveyed in strong and nervous language, a very direct censure upon the conduct of the Lord Lieutenant of Ireland, Lord Hardwicke, and the Lord Chancellor, Lord Redesdale, and also upon one Alexander Marsden, Esq. a secretary of state and others. The information, which was very long, it is not necessary to set out. It charged that the defendant "unlawfully and maliciously devising and intending, to move and excite the liege subjects of our said lord the king, to the hatred and dislike of our said lord the king's administration of the government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great Britain and Ireland, called Ireland, were oppressed, aggrieved, and injured by our said lord the king's government of the said part of the said united kingdom, and to tra-

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* The case was argued in Michaelmas and the certificate sent in Hilary term

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The KING against the Honourable ROBERT JOHNSON.—July 1.

To an indictment for a libel in England, the defendant cannot plead that there are and were before the union, courts competent in Ireland, to the trial of offences, and that he was born and commorant there at the time of the publication of the supposed libel; for this plea does not shew a jurisdiction in any other court, and is a mere not guilty.

THIS was an indictment against the defendant, one of the judges in the court of common pleas in Ireland, for a libel which had been published here in England, in *Cobbet's Weekly Register*, in letters upon the affairs of Ireland under the signature of *Juverna*, and which conveyed in strong and nervous language, a very direct censure upon the conduct of the Lord Lieutenant of Ireland, Lord Hardwicke, and the Lord Chancellor, Lord Redesdale, and also upon one Alexander Marsden, Esq. a secretary of state and others. The information, which was very long, it is not necessary to set out. It charged that the defendant "unlawfully and maliciously devising and intending, to move and incite the liege subjects of our said lord the king, to the hatred and dislike of our said lord the king's administration of the government of this kingdom, and to insinuate and cause it to be believed that the people of that part of the United Kingdom of Great Britain and Ireland, called Ireland, were oppressed, aggrieved, and injured by our said lord the king's government of the said part of the said united kingdom, and to tra-

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duce, defame, and villify the persons employed by our said lord the king in the administration of the government of the said part of the said united kingdom, and especially the Right honourable *Philip* Earl of *Hardwicke*, our said lord the king's lieutenant-general and governor-general of the said part of the said united kingdom, and the Right Honourable *John* Lord *Redesdale*, our said lord the king's Lord Chancellor, and keeper of the Great Seal, and one of his most honorable Privy Council, of, and for the said part of the said united kingdom, on the 5th day of *November*, in the 44th year of the reign of our sovereign lord *George* III. by the grace of God of the united kingdom of *Great Britain* and *Ireland*, king, defender of the faith, at *Westminster*, in the county of *Middlesex*, unlawfully and maliciously did compose, write, publish, and print, and cause and procure to be composed, written, published, and printed; a certain scandalous and malicious libel in the form of a letter, intituled, *Affairs of Ireland*, containing therein divers scandalous and malicious matters, and things of and concerning the said part of the said united kingdom, and the people thereof, and our said lord the king's government thereof; and also of and concerning the said *Philip* Earl of *Hardwicke*, so being such lieutenant and governor as aforesaid, and the said *John* Lord *Redesdale*, so being such Chancellor and privy counsellor as aforesaid; and also of and concerning *Alexander* *Marsden*, Esq. then and there being one of the under secretaries in the office of the chief secretary of the said *Philip* Earl of *Hardwicke*, so being such lieutenant and governor as aforesaid, (that is to say,) in one part thereof according to the tenor and effect following: [Here followed the libel, which was written with all the keenness and poignancy of a satirist, who either did not know or fearlessly disregarded the law. It is unnecessary to state it at length, but the effect of it was as follows: With more wit than either discretion or, it must be

hoped, *truth*, the writer compared the administration of *Ireland* to the *Trojan horse*, which though made of wood itself, contained within it a chosen band for the ruin of the country to which it was sent; and though he paid a just tribute to the private virtues of Lord *Hardwicke*, yet called him a *wooden head*, and said that “*the government of a harmless man is not therefore a harmless government.*” The Lord Chancellor he chiefly designated by the title of a *strong-built Chancery pleader*, as he did Lord *Hardwicke* by that of a nobleman skilled in the feeding of sheep. The conclusion of the indictment was in the ordinary form.

Upon this indictment being found, a warrant was issued by Lord *Ellenborough*, C. J. for the apprehension of the defendant in *Ireland*, under the statute 44 Geo. III. c. 92, by virtue of which he was taken into custody; and upon an *Habeas Corpus* being sued out, his case was twice argued in *Ireland*, before the barons of the court of *Exchequer*, and the judges of the *King's Bench*, when, after much debate, and with a difference of opinion amongst the judges of each court, his case was deemed within the act, and he was brought over here in custody, but was bailed immediately upon his arrival. To the indictment, the defendant pleaded as follows, viz.

The Hon. Robert Johnson, } And now, that is to say, on
Esq. att. the King. } *Monday* next, after the
Morrow of the *Ascension* of our Lord in this same
term, before our said lord the king at *Westminster*, the
said *Robert Johnson* in his own proper person, comes,
and having heard the indictment aforesaid read, and
protesting that he is not guilty of the premises charged
in the said indictment, or of any part thereof, for
pleas, nevertheless saith, that he ought not to be
compelled to answer to the said indictment, because he
saith, that the kingdom of *Ireland* before and until

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the time of the union of the two kingdoms of *Great Britain* and *Ireland* was regulated and governed by the proper laws and statutes of the kingdom of *Ireland*, and not by the laws or statutes of the kingdom of *Great Britain*, or by the laws or statutes of *England*, and that ever since the said union of the said two kingdoms that part of the united kingdom of *Great Britain* and *Ireland*, called *Ireland*, hath been and yet is governed and regulated by the proper laws and statutes of that part of the said united kingdom called *Ireland*, and not by the laws or statutes of that part of the said united kingdom called *Great Britain*, or by the laws or statutes of *England*: and the said *Robert Johnson* further saith, that in the said kingdom of *Ireland*, before the said union, and in that part of the said united kingdom called *Ireland*, since the said union, there always have been and now are courts and jurisdictions therein being and thereto belonging distinct from the courts and jurisdictions of *Great Britain* or of *England*, or of any part thereof, and competent and sufficient for the trial of all offences committed by the natives or inhabitants of *Ireland*, during the time of their respective residence and comorancy in *Ireland*: and the said *Robert Johnson* further saith, that he was born within *Ireland* and out of *Great Britain*, and before the said union, to wit, on the 1st day of *October*, in the year of our Lord, 1752, to wit, at *Westminster*, in the County of *Middlesex*; and that the said *Robert Johnson* on the 1st day of *November*, in the year of our Lord 1802, and thenceforth continually until at and after the time of presenting the said indictment by the jurors aforesaid, in form aforesaid, presented, to wit, until and upon the 31st day of *May*, in the year of our Lord 1805, was resident and comorant within that part of the said united kingdom called *Ireland*, and not elsewhere, and that the writings by the said indictment called libels, and in the said indictment mentioned, were and are of and concerning cer-

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tain matters and things which took place in *Ireland*, after the said 1st day of *November*, in the year of our Lord 1802, to wit, on the 23d day of *July*, in the year 1803, and subsequent thereto ; and that the composing, writing, publishing, and printing the said writing by the said indictment alleged and mentioned, and the committing of all the supposed offences therein mentioned took place, and were after the said 1st day of *November*, in the year of our Lord 1802, and while the said *Robert Johnson* was so resident and commorant in *Ireland* as aforesaid, and not elsewhere, to wit, on the 1st day of *January*, in the year of our Lord 1804, that is to say, at *Westminster* aforesaid, in the county of *Middlesex* aforesaid, and this he is ready to verify : wherefore the said *Robert Johnson* prays judgment, if the court of our lord the king here will further proceed upon the said indictment against him, and that he may be dismissed from the court hereof, and upon the premises.

JOHN RICHARDSON.

This plea was verified by affidavit as follows :

In the *King's Bench, Middlesex* ; *The King* against the *Hon. Robert Johnson*, The Honorable *Robert Johnson*, of *Dublin*, in the kingdom of *Ireland*, the defendant in this cause, maketh oath and saith, that the plea hereto annexed is true in substance and matter of fact.

ROBERT JOHNSON.

To this plea there was a demurrer, and thereupon a joinder in demurrer.

ABBOT, in support of the demurrer. " The question is, whether this plea or any thing contained therein, is sufficient to oust this court of its jurisdiction. But there is nothing in it to shew that this court cannot try a prosecution for a libel ; and it is difficult to find argu-

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ments against the plea until some argument is adduced in support of it, for at present it seems to need no argument to prove its insufficiency. One of the essential requisites of a *plea* to the *jurisdiction* of any court is, that it should shew another *forum* which is competent to try the subject matter. The *Doctrina Placitandi*, p. 234, says, *Nata* "when a man pleads to the jurisdiction of one court, he ought to give jurisdiction in another." So in *Mortyn v. Fabrigas*,* Lord Mansfield holds a similar doctrine, and says that in such a case the party must shew a more proper remedy, for if there be no other mode of trial, that alone will give the court jurisdiction. But this plea does not shew, nor is it possible to shew, that any court of *England* or *Ireland* has jurisdiction in this case, exclusively of this court, to try the offence charged in this indictment. It may indeed be true that there are courts in *Ireland* competent to the trial of offences committed by persons there; but there is no court there competent to try offences committed here. There is not much in the books concerning pleas to the jurisdiction. They are chiefly reducible to three classes, but this does not fall within either of them. The first is on the ground of the subject matter of the suit, as in pleas, that the land is *ancient demesne*. Another is, where the matter of the suit lies out of the ordinary limits of the jurisdiction of the court; as if there was a borough within a county, which by charter has a right to try offences there, and it is directed that the justices of the county shall not have jurisdiction there; if in such a case a person is indicted at the quarter sessions, he may plead the jurisdiction of the borough, bringing himself within the meaning of the charter, and shewing the offence to have been committed there. The last kind is a plea to the person of the *defendant*; as where an officer of a superior court is entitled to be

* Cowp. 173.

sued only in that court. The *defendant's* case does not come within either of these classes. Whatever might have been the case before the union, as to any distinction between subjects of the *king* and of the *crown* of this country, yet now there is no difference between the natives of both countries in this respect; they are each subjects of the king and of the crown of the united kingdoms. Even if a foreigner residing abroad had sent this libel in a letter into this kingdom, he might be tried here, when he came within the jurisdiction of the court so as to be apprehended. But whether that be so or not, the *defendant* is not in the case of such a foreigner; he is a subject of this realm, sending from one part of it a libel to be published in another; which is not distinguishable from the case of a man writing in one country, and publishing in another, by his agent. As, if a person born at *Bristol*, which has a peculiar jurisdiction, was to write a libel and send it to be published in *London*, he could not plead the peculiar jurisdiction of *Bristol* to an indictment in *London*. This plea is no more than a constructive *alibi*, and an argumentative plea of not guilty. It says, 'I cannot be guilty of publishing this libel in *Middlesex*, because I was born in *Ireland*, and resided there during a period which includes the time of the publication here.' But that is immaterial; the question is, where he did the fact. If what is stated in the plea be true, and it applies at all, it must be supposed to be impossible that he can be guilty of the offence here; but he cannot have the benefit of that, upon this plea in abatement; nor, if it is good in abatement, can he take advantage of it upon not guilty. But it is not necessary that the *defendant* should be personally present here, when the libel is published. In the case of a conspiracy, where some acts are done in one county and some in another, the indictment may be in either, and possibly in one where the *defendant* never chanced to be in his

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bound to obey the revenue laws of a foreign state ; and it has been held that they are not, and that it is not contrary to good faith to transgress them.”*

LORD ELLENBOROUGH, C. J. “ That is only because we do not enforce *their* laws ; we leave the foreign country to settle the matter as it can.”

RICHARDSON. “ There are various offences created by the revenue laws of this country which would not be enforced here against a foreigner. By 13 and 14 Car. II. c. 18, s. 11, it is forbidden to export wool, and an Englishman would be indictable for a misdemeanor under that statute. But if it were exported in consequence of an order from a *Dutch* merchant at *Amsterdam*, he would be a principal in the misdemeanor, and yet, if he were to come to *England* afterwards, he would not be indictable. It may indeed be said that there is a difference between *mala prohibita* and *mala in se*, a distinction which has been recognised in some cases ; as in *Monlicres’* case, in *Foster*, 188, where a foreigner who had stolen goods from a shop was acquitted of the statutable offence and was found guilty of *theft* as at common law.”

LORD ELLENBOROUGH, C. J. “ I hope that case will not be considered as having the assent of all the judges. I do not see how a man can be considered to be deprived of the advantages which the statute law might have given him in some cases. It was only the humane decision of a single judge, who perhaps went too far. The *defendant* was, however, a prisoner of war in close duress, if that makes any difference.”

RICHARDSON. “ In every case the law punishes crimes not as *malum in se*, but as if it were *malum pro-*

libitum, and there is no crime punished equally in all countries. There is no universal *malum in se*. The law of libel is one upon which there is the most difference.*

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LORD ELLENBOROUGH, C. J. "You do not suggest that there is any difference between the two countries."

RICHARDSON "In *Ireland* as in *England* there is a body of unwritten maxims which form the common law of *Ireland*, distinct from that of *England*. The circumstance that these two countries have adopted the same common law is immaterial. Lord *Coke*, in his first *Institute*, 141, b, is of opinion that it was introduced by the consent of the parliament of *Ireland* in King *John's* time; but *Vaughan*, C. J. is of a different opinion,†

* Here the case being incidentally mentioned of a person pleading a justification of words imputing felony to the plaintiff, and the words being found true, whereupon, it is said the plaintiff may be tried without a finding by the grand jury; LORD ELLENBOROUGH said "I have heard that case mentioned (see *Strange*) but I could never satisfy myself of the authority."

GROSE, J. "I remember a case at *Bristol*, before *YATES*, J. where a man was proved guilty of a felony imputed to him, and he doubted whether he should commit the person instantly. It was found then, that Mr. Recorder, *Dunning*, had jurisdiction, and it was said that if the judge could have committed the plaintiff, the court of *King's Bench* would have a jurisdiction every where."

LORD ELLENBOROUGH, C. J. "I have heard it said upon the relation of Mr. Justice *Gould*, that a man was convicted and executed upon such a finding. But I never upon inquiry could discover that it really was so. I believe the parties are always sent immediately before the grand jury."

† 1 *Kaugh*. 294; and see 1 *Blackst. Com.* 100.

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and that it was adopted merely upon the authority of the king's letters patent. But how this coincidence originated is immaterial; for there is no pretence to say that the law is of force there as being the law of *England*, it can only have force in *Ireland*, because it is adopted either by the custom or the parliament of the country. By the 22 Geo. III. c. 53, the 6 Geo. I. c. 5, which declared the right of appeal to be in the *English* house of lords, was repealed. The 23 Geo. III. c. 28, made the right of *Ireland*, to be governed by its own laws, enacted by the king in the Irish parliament, still more clear; and the language of that act is so strong that it gave rise to some doubt whether even private acts regulating estates in *Ireland* could be valid. The laws were then as distinct as those of *Scotland* before the union; and the union with *Ireland*, still confirms the separate individuality of the two nations as to their laws, for they treated for the union upon terms of the most perfect equality as nations. And in the eighth article of the union, it is declared that the laws in force before the union, and all courts of ecclesiastical and civil jurisdiction, shall remain exactly as heretofore. An *Irishman*, it is true, is not an *alien*, upon the principle in *Calvin's* case. As to the objection that every plea to the jurisdiction must point out a proper court, for the trial of the offence, it need not be in *England*. All crimes are considered as local; and the inconvenience of trying the *defendant* here would be extreme; since he has no compulsory means of citing witnesses, to appear in his defence, from *Ireland* where he is most known. In the case of *Kinloch*,* the court obliged him to plead to the jurisdiction.

Here the court instanced the cases of Lord *Straford*, of Mr. *Hastings*, and of the *King v. Captain*

* *Foster's Rep.* 16.

Brisac,* as cases of offences committed abroad, but tried in *England*.

ABBOT, in reply. "The *defendant* does not shew that there is any difference between the laws of *England* and *Ireland*; this is a fact committed in *England*; and as to the case of *Kinloch*, Judge *Foster* was of a different opinion, and that he should plead *not guilty*."

Cur. adv. vult.

Afterwards, *Monday, July* the 1st, the judgment of the court was delivered to the following effect by

LORD ELLENBOROUGH, C. J. After stating the case : "It is objected to the plea, that it is bad in respect of not shewing what court has jurisdiction to try the offence, and that it amounts only to an argumentative plea of not guilty. In support of this, the *Doctrina Placitandi*, p. 234, has been cited, which is a book of great authority upon questions of pleading, and also what has been laid down by Lord *Mansfield*, in *Cowp.* 170, namely, that in every case of a plea to the jurisdiction of the king's court you must shew a more proper and sufficient *forum* for the trial of the matter in question; for if there be no other mode of trial, that alone will give the king's court jurisdiction. And in *Kinloch's* case, *Foster's Crown Law*, 16, it is said that the matter of such a plea as this may be given in evidence upon the general issue. By the counsel for the *defendant*, the necessity of thus putting it on the general issue is denied; and it is argued that it is not necessary in this case to shew a particular place of trial in this country, because of the total want of jurisdiction in any court here, and the impossibility of any such court or place of trial existing. But this very admission goes to shew that the plea is bad. For if that cannot be done,

* See the *Law Journal*, Vol. 2, O. S.

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which is required by the general rules of pleading, the consequence is that the matter relied upon cannot oust the court of its jurisdiction, but is matter to be taken advantage of either upon a *plea* in bar, or *plea* of *not guilty*. The record admits the crime to have been committed in *Middlesex*, and the proposition, in effect, is this; admitting that the crime was committed in *Middlesex*, I still insist that I am not punishable by any court of this part of the united kingdom, though I cannot shew that I am amenable to any other. This, therefore, carries its own refutation with it, upon the authority of Lord *Mansfield*, to which may be added, that of Lord *Hardwicke*, 1st *Vesey*, 202, in the case of the Earl of *Derby* against the *Duke of Athol*. 'That was a bill filled for a discovery concerning the general title to the *Isle of Man*, and to have relief relative to certain rectories and tithes. The defendant pleaded in general to the jurisdiction of the court, that the *Isle of Man* was an ancient kingdom, not part of the realm; though belonging to the crown of *Great Britain*, and that no lands, &c. there ought to be tried or examined into here; demanding judgment whether he should be put to answer further. The Lord Chancellor said, "this comes to be of great consequence to all the courts in *England*; there are two general questions on this plea; first, whether the plea is good in point of form; not a trifling form, for if the objection thereto on the part of the plaintiff be right, it is material to the nature of such plea; secondly, whether good in substance. As to the first, it is objected for the plaintiff that although it is shewn in the negative, and alleged that this court has no jurisdiction over the *Isle of Man*, and that it is not to be tried here, yet it is not shewn in the affirmative what other court has jurisdiction, or that there are courts in the *Isle of Man* holding plea thereof, and the rule is insisted on that whoever pleads to the jurisdiction

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of one of the King's superior courts of general jurisdiction must shew what other court has jurisdiction. I am of that opinion, and that for the want thereof, the plea is bad, and ought not to be allowed, if nothing more is in the case, as it is expressly laid down in 2 H. VII. 17, a, and *Doctrina Placitandi*, 234, and is agreeable to the general rule of pleas of this sort, as in pleas of abatement, wherein it must be shewn, the plaintiff may have a better writ. The reason of this is, that in seeking for his right, a person is not to be sent every where to look for a jurisdiction, but must be told what other court has jurisdiction, or what other writ is proper for him, and this is a matter of which the court, where the action is brought, is to judge. There are not many authorities on this head, but in the old books of entries the form of pleading is so, and the opinion of Popham, C. J. in *Yelverton* 13, and *Fitz. Ab. tit. Jurisdiction*, concerning *Wales*: and, although *Lord Vaughan* may have denied that to be law, he was a very strong *Welshman*, as appears throughout his argument; in which, though there is a great deal of good and useful learning, yet it never was delivered, though intended to be so. It is said to this that the court ought in this case to take notice of what is the jurisdiction, and the matter of fact is shewn, and it is likened to the case of inferior courts, wherein it is sufficient for the defendant to plead that the cause of action arose out of the jurisdiction of that court. But I cannot put this, which is a superior court of general jurisdiction, in whose favour the presumption will be, that nothing shall be intended to be out of its jurisdiction, which is not shewn and alleged to be so, upon a level with an inferior court of a limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged to be so; 1 *Saunders*, 74. I was desirous to be informed how the pleas were in this court which are looser than at law, and no case has been

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cited in which the plea to the jurisdiction of this court has not given it to another. And afterwards, in speaking of this case, Lord *Hardwicke* says, I would not be understood as having overruled the plea on the affirmance of a general jurisdiction over the *Isle of Man*; but the *plea* was to the jurisdiction, without averring to what court the jurisdiction belongs, and you must always shew where the jurisdiction rests." If the circumstances attending the case of the present *defendant*, namely, that of his birth, in *Ireland*, before the union, and his residence there, as stated in the plea, have the effect of rendering him not answerable, for such publication, to any *forum* in *England*, it must follow from its being no crime; for it rests upon this, that he owed no obedience to the laws of this country and that, owing no such obedience, he ought not to be punished for the breach of them. But such a defence, if it is available in law in any form, is matter of absolute bar, and the plea ought not to have been in the present form, but it might be taken advantage of upon the general issue.

Judgment that the *defendant* should plead over on the morrow, which was immediately afterwards altered to judgment of *respondent ouster instanter*.*

* On a previous day in this term, the above plea being filed, the *Attorney-general* moved the court for a day for the *defendant* to join in demurrer, peremptorily. He stated the practice to be, that after the demurrer a four day rule was given for the *defendant* to join in demurrer, otherwise judgment; but notwithstanding this, judgment could not be entered without a motion in court, and that it was in the discretion of the court, to order the *defendant* to join *instanter* or not. He cited also an entry by Sir *Simon Harcourt*, in the Crown Office books, and also the practice as reported by him in the *State trials*, vol. 6, 213, M. T. 9 Geo. III. He said that in *Hil. 36 Car. II.* there appears in the rule book of the office

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By the 31 Geo. II. c. 10, s. 30, no person receiving wages, &c. for the service of any officer, seaman, or other person, in the royal navy, shall take or retain more than 6d. in the pound, &c. under a penalty of 50l. This applies to a lieutenant; and whereas, by subsequent acts, he is empowered to draw for his pay every three months, the agent who makes up his accounts is entitled to receive 6d. in the pound only upon the balance actually received and paid by him, the agent; and if, through mistake of the law, he deducts in such case upon the whole sum paid by government, he is liable to the penalty.

THIS was an action of debt brought by the plaintiff, upon the statute 31 Geo. II. c. 10, s. 30, against

two four day rules, and on the expiration of each, a rule on the motion of the Attorney-general to join in demurrer instantly.

In the *King v. Broughton*, Trin. 28 Geo. III. there is the following entry: 'Monday next after fifteen days of the Holy Trinity, rule given to join in the demurrer on Friday; and on Saturday next, after fifteen days of the Holy Trinity, a rule is given to join in the demurrer peremptorily. In the *King v. Randall* there is a rule given on — next after fifteen days of St. Martin, Hil. 28 Geo. II. to join in demurrer peremptorily on the morrow. He cited also 2 *Tidd's Practice*, 649, to shew the distinction between criminal and civil cases, and said that in capital cases the defendant, being at bar, must plead *instante*. The result of the practice stated by Sir Simon Harcourt is, that in misdemeanors there are two four day rules, and a peremptory rule moved for, and that on a demurrer, there is a four day rule to join and a rule moved for.

The court directed him to take a rule for the defendant, to join in demurrer on the morrow, by which means, it was stated, the demurrer would be argued in the term, and the defendant, might have a trial at bar in the sittings within next Michaelmas Term.

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the defendants, navy agents, to recover penalties incurred by them, for having taken more than 6d. in the pound as commission allowed by that act, in respect to monies received by them on account of Lieutenant *John Walsh*, commander of his Majesty's late gun brig, the *Pelter*. The action was tried at the sittings after *Hilary term*, 1806, before Lord *ELLENBOROUGH*, and a verdict was found for the plaintiff, to be entered on the 11th or 12th counts as the court should direct, subject to the opinion of the court on the following case. Those counts are as follows, viz. "And the said *Richard Walsh* further saith, that before and at the time of committing of the offence, hereinafter next mentioned, the said *Richard Toulmin* and *Abraham Toulmin*, had been and then were employed by one *John Walsh*, then an officer in the royal navy, that is to say, a lieutenant in, of, and belonging to a certain gun brig, in the navy of our lord the now king, called the *Pelter*, in the receiving of certain wages, prize money, and other monies due to the said *John Walsh*, upon account of the service of the said *John Walsh* in the royal navy aforesaid, to wit, at *Westminster* aforesaid, in the county aforesaid; and being so employed, they the said *R. T.* and *A. T.* did afterwards and before the committing of the offence, herein after next mentioned, to wit, on the 16th day of *April*, in the said year of our Lord 1804, receive for the said *John Walsh*, upon account of his services in the royal navy as aforesaid, a large sum of money, to wit, 125l. 18s. 1d. of lawful money of *Great Britain*, to wit, at *Westminster* aforesaid, in the county aforesaid; yet the said *Richard Toulmin* and *Abraham Toulmin*, not regarding their duty in that behalf, nor the statute in such case made and provided, nor fearing the penalties therein contained, after the receipt of the said sum of money, to wit, on the 19th day of *May*, in the year of our Lord, 1804, at *Westminster*

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aforesaid, in the county aforesaid, did demand for receiving thereof and for paying the same to the said *John Walsh*, the person by whom the said *Richard Toulmin* and *Abraham Toulmin* were employed as aforesaid, or according to his direction, and for their trouble and attendance, an allowance or valuable consideration, exceeding in the whole the sum of 6d. in the pound for the monies so received, that is to say the sum of 19l. 14s. 6d. of lawful money of Great Britain, contrary to the form of the statutes in such case made and provided, by reason whereof and by force of the said statute the said *Richard Toulmin* and *Abraham Toulmin* forfeited for their said last mentioned offence, the sum of 50l. and by reason of the premises, and by force of the said statute, an action hath accrued to the said *Richard Walsh*, to demand and have of the said *Richard Toulmin*, and *Abraham Toulmin*, the sum of 50l. further parcel of the said sum of money above demanded. And the said *Richard Walsh* further saith, that before and at the time of the committing of the offence hereinafter next mentioned, the said *Richard Toulmin* and *Abraham Toulmin* had been, and then were employed by one *John Walsh*, then being an officer in the royal navy, that is to say a lieutenant in a certain gun brig in the navy of our lord the now king, called the *Peller*, in the receiving certain other wages, prize money, and other monies due to the said *John Walsh*, upon account of the service of the said *John Walsh* in the royal navy aforesaid; and being so employed, they the said *Richard Toulmin* and *Abraham Toulmin* did afterwards and before the committing the offence hereinafter next mentioned, to wit, on the 18th day of *April*, in the year of our Lord 1804, receive for the said *John Walsh*, upon account of his services in the royal navy as aforesaid, a large sum of money to wit 195l. 18s. 1d. of lawful money of Great

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Britain, to wit, at *Westminster* aforesaid, in the county aforesaid : yet the said *Richard Toulmin* and *Abraham Toulmin*, not regarding their duty in that behalf, nor the statute in such case made and provided, nor fearing the penalties therein contained, after the receipt of the said sum of money, to wit, on the 19th of *May*, in the year of our *Lord*, 1804, at *Westminster* aforesaid, in the county aforesaid, did retain, for receiving thereof, and for paying the same to the said *John Walsh*, the person by whom the said *Richard Toulmin* and *Abraham Toulmin* were employed as aforesaid, or according to his direction, and for their trouble and attendance, an allowance or valuable consideration exceeding in the whole the sum of 6d. in the pound, for the monies so paid, that is to say, the sum of 13l. 4s. 6s. of lawful money of *Great Britain*, contrary to the form of the statute in such case made and provided, by reason whereof, and by force of the said statute, the said *Richard Toulmin* and *Abraham Toulmin* forfeited for their said offence the sum of 50l. and by reason of the premises and by force of the said statute an action hath accrued to the said *Richard Walsh* to demand, and have of the said *Richard Toulmin* and *Abraham Toulmin* the sum of 50l. residue of the said sum of money above demanded." Prior to the defendants becoming agents to *Lieutenant Walsh*, Mr. *James Inglis Lawson* was his Navy agent for the said Gun Brig, from the year 1796 to the 13th July, 1801, during which time *Lieutenant Walsh* drew several bills on account of pay and wages thereof, which to the amount of 82l. 13s. were remitted to Mr. Lawson, not as agent but as negotiable securities in the ordinary course of business, and he paid and charged commission on them. The 26th November, 1803, the defendants were appointed, by *Lieutenant Walsh*, his agents, by power of attorney; and in February, 1804, made out and delivered to him the following account, and paid him the balance of 138l. 17s. 6d. viz.

	L.	S.	D.	1805.
Nov. 26, 1803.—To power of attorney,	0	17	0	
15.—To making out account per <i>Pelter</i> , with stamps,	5	5	0	WALSH versus TOLMAY and Another.
27.—To paid Mr. <i>Lawson</i> , balance of his account,	20	7	4	
31.—To postage,	0	0	7	
To balance due to Lieut. <i>Walsh</i> , and paid to you 14th Feb. 1804,	138	17	6	
	165	7	5	
Dec. 2, 1803.—By Balance, bill, <i>Pelter</i> , Commission,	150	0	0	
	3	15	0	
	146	5	0	
21.—By poundage of slops of do. £27 16 2				
Debt, 6l. 6s. 3d.—Fee, 1l. 13s. 6d.—Commission, 14s.	8	13	9	
	19	2	5	
	165	7	5	

And in *May*, 1804, the *defendants* made out and delivered the following account to Lieutenant *Walsh*, and paid him the balance.

1804.—To fees passing account, <i>Pelter</i> , £11 0 6			
24th May, 1801.—To trouble to ditto,	15	15	0
May 19.—To paid you,	95	18	6
	122	14	0
April 18,—By pay and servants per <i>Pelter</i> , 11th Sept. 1796	528	10	9
May 24, 180 .			
Drawn, £392 12 3			
Commission, 13 4 6			
	405	16	9
	122	14	0
	4	11	2

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The sum of 392l. 12s. 3d. above mentioned, was all drawn before the execution of the power of attorney to the defendants, namely, between the year 1796, and 24th of May, 1804, and includes the 22l. 13s. received by Mr. Lanson. The whole which the defendants received was 135l. 18s. 1d., which they received the 24th of May, 1804, under the power of attorney.

Since the statute 35 Geo. III. c. 94. a lieutenant is entitled to draw every three months, and the agent only receives the balance, which may remain due after deducting the drafts, and which the lieutenant has it in his power to reduce to a sum of little more than 10l. This account is made out by the clerks in the pay office, and not by the agent, but it is the business of the agent to examine such account, to see that it corresponds with the drafts produced by the clerk, and that the balance is rightly struck; and the defendants did so in the present occasion, and also passed all *Lieutenant Walsh's* accounts, for the whole period in which the pay of 528l. 10s. 4d. accrued. And it has been the general practice with navy agents, to charge commission on the whole of the amount, and not on the balance which may remain to be received, after deducting the sum drawn for. This commander of a gun brig acts also as purser, and as such has accounts to make up and pass, and when passed, he is not unfrequently found deficient in these accounts, and in debt to government; in which case the balance of his pay is stopped, and there is nothing for the agent to receive. The question for the opinion of the court is, whether the defendants have incurred the penalty of 50l. by taking or demanding the money above mentioned.

WIGLEY, for the plaintiff. "This case falls directly within the words and meaning of the act 31 Geo. III. c. 10. § 30, which enacts, "that no person whatsoever, who shall be employed in the receiving of any wages,

pay, prize-money, or any other monies, due or becoming due for or upon account of the service of any officer, seaman, or other person in the royal navy, shall be entitled to take or retain more than 6d. in the pound for or upon account of receiving thereof, and for paying the same to the person or persons by whom he or they shall be employed, or according to the direction and appointment of such person or persons, and for his and their trouble and attendance in relation thereto. And if any person or persons so employed shall directly or indirectly *demand*, take, or *retain*, any allowance, gratuity, reward, or valuable consideration exceeding in the whole, the sum of 6d. in the pound for the monies so received as aforesaid, every such person, shall, for every such offence, forfeit the sum of 50l. to be recovered with full costs of suit, &c." Even if the money drawn by the *plaintiff* himself is to be charged with 6d. in the pound to an agent, the former agent, and not the *defendants*, is entitled to it; for the person who is entitled to the commission is the agent appointed during the time for which the pay is received, and not he who goes to the navy office to make up the accounts. It is however to be said that the 35 Geo. III. c. 94, has repealed this act, because the lieutenant is thereby enabled to draw every three months, and therefore there may be nothing for the agent to receive; and because as the *lieutenant* of a gun brig acts as purser, he may in some cases overdraw the account and be in debt. By s. 15, the bills which are drawn are to be examined by commissioners of the navy. By s. 17, an account, current is opened in the navy office, with every officer, and therefore the agent could only have to copy this account; but for this account, by s. 28, no deduction is to be made either on account of usage or otherwise."

LE BLANC, J. "That is only at the navy office."

WIGLEY. "The navy agent is merely the private agent of the party, and the statute has limited what his

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fee shall be. The lieutenant had drawn 929l. 12s. 3d. himself, and the legislature did not intend that the 6d in the pound should be charged on the total of the credit side of the account, but on the money actually received. The *defendants* have charged on 500l. which is far more than they have received, and therefore they have incurred the penalty."

LAWES, *contra*. "If the agents, the *defendants*, have transgressed the letter of the act, they have done it through inadvertence, and have not, therefore, been guilty of the offence stated upon this record. But this clause of the statute is not applicable to the present case. The act, as appears from the preamble, and the title, and from several clauses in the body of it is applicable only to the case of persons receiving the wages of seamen and inferior officers. The title mentions only the protection of seamen. The preamble recites the necessity of establishing a regular method for the payment of wages to inferior officers and seamen."

LAWRENCE, J. "The title of the act makes no distinction between officers and seamen."

LAWES. "The 4th section, which is expressly applicable to officers, contains the words *any inferior officer*. In every clause, the words are 'inferior officers and seamen;' in no one clause is the word *commissioned officer*. In the 6th section, which provides for the payment of wages, a commissioned officer is not included in the term officer there used, for he is not upon the ships' books; but such persons only are the objects of that clause; and that is the only clause in which they can be included."

LE BLANC, J. "The 24th section introduces a new subject into the act, namely, the penalty upon forging powers, wills, and receipts of *such* officers and seamen: this must apply to superior officers."

LAWES. "The question will then be, not so much whether the *defendants* are entitled to retain the 6d. in the pound upon the whole sum, as whether they have been guilty of an offence under all the circumstances. The legislature did not mean to put the superior officers upon the same level with the common men. The latter it knew to be characteristically improvident, and subject to be deceived; but the former, from education and their situation in life, could want no protection. The 35 Geo. III. c. 94, must be considered as having repealed this part of the act. There is nothing in this act to diminish either the trouble or the responsibility of the agent; except merely as to the receiving of the money; for he is still bound to check the accounts. The words *other persons* might have been used in the statute to include landsmen doing duty on board a ship, as opposed to seamen. Though the agents have in this case charged 6d. in the pound, they did not conceive that the act applied to superior officers; nor can it be said that they have violated even the words of the statute; for they have charged not more than 6d. in the pound, although through mistake they have charged it upon 500l. instead of the less sum. It is like the case of 10l. per cent. being taken by mistake, and though they may be liable to refund to the *plaintiff* in an action for money had and received, yet they are not subject to penalties in this action."

Lord ELLENBOROUGH, C. J. "In this statute there are the words *retain* as well as demand and take. The agents have to deal with the most negligent men in the world, as to all affairs relative to money transactions; the law therefore puts the agents particularly upon their guard, and we could never enforce it, if it were required there should be an actual claim. The legislature says these men must be guarded by every pos-

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sible precaution, and the men who act for them must be punished, if they receive more than 6d. in the pound: If therefore, the sum which they have charged and received exceeds 6d. in the pound, upon the sum which they have received, they must be subject to the penalty for the 50l. In the case of usury the issue is upon the corrupt agreement. The only difficulty I have had in the case has been whether the act applies only to inferior officers; but the word *officers* must, by reference, have a larger sense than the words *petty officers*; and if it is so to be understood in a larger sense, it means officers in general and the question is only, whether in this case the *defendants* have charged more than 6d. in the pound upon the sum received by them, in which no account can be taken of the money antecedently received by the *plaintiff*, or his former agents. It is said this cuts down the compensation for their trouble to little or nothing; in that case, they may renounce the office. But if they take upon themselves to perform the duty of agents, the legislature says that these improvident and careless men shall be protected. Whether by negligence or otherwise, the *defendants* have forfeited the penalty.'

GROSE, J. "Whether inadvertently or not the *defendants* have received more than 6d. in the pound: and I am not for narrowing the effect of the statute."

LAWRENCE, J. "If this *plaintiff* is not an officer under the 31st Geo. II. c. 10. s. 30, he must be excluded from the protection of the 24th section. I must conclude, therefore, that the legislature meant lieutenants to be included, unless where it has expressly excluded them. Then the question comes to this, whether the *defendants* have received above 6d. in the pound? The sum received by them was 135l. 18s. and they say, they are entitled to receive 6d. in the pound for all the sums of money due for several years to him as

lieutenant of this gun-brig, and before their agency began, to the amount of 500l. This is certainly taking more than 6d. in the pound upon the money which they have received."

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LE BLANC, J. "It would be an extraordinary construction to say, that the *plaintiff* is not comprised in this clause merely on account of the words in the preamble. I should hold that he must be included in the 24th section, which provides against the personating of such officers and seamen, which by reference must make the former words include all officers. Then have they incurred the penalty. They have charged for receiving 500l. but they have received the 6d. in the pound, for the receiving of 135l. 18s. although they have calculated it on 528l. which in fact they did not either receive or pay. They have besides charged on one side of the account 15l. 15s. for their trouble in examining and settling the accounts, besides the 1l. 0s. 6d. for the fees thereupon."

POSTEA TO THE PLAINTIFF.

The KING *against* WISEMAN, *ex parte* NEWTON,
June 25th.

On a motion for a *habeas corpus* to a private person, on the application of a husband, to bring up the body of his wife, the affidavit must state that she is detained against her will.

SCARLETT moved for a *habeas corpus* to a Mr. Wiseman, a clergyman at Rumford in Essex, to bring up the body of one Mrs. Newton, who had lately, in this court, exhibited articles of the peace against her husband. And it was now stated that it was through the interference of Mr. Wiseman that she kept from her husband.

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versus
WISEMAN,
ex parte
NEWTON.

LE BLANC, J. to Scarlett: "Does your affidavit state that she is kept against her will?"

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SCARLETT. "The husband says he verily believes that if he had an opportunity of conversing with her, he might induce her to return home. He demanded that he should have access to her, but was told that he should not be permitted to see her."

Lord ELLENBOROUGH, C. J. "It does not appear that she is under any restraint. You do not state that the refusal to admit the husband to the house of *Wisseman* was not upon her own suggestion. Suppose she was brought into court, we should let her go at large. Unless it is suggested that there is a restraint upon her, we cannot issue the writ. If he seduced her from her husband, you may have your action."

RULE TO SHew CAUSE REFUSED.

DALTON against SMITH.—June 21st.

A count that the defendant, in consideration that the plaintiff had sold and delivered divers goods, undertook to pay quantum valebant, upon demand, with an averment that the said goods were worth 20l. whereby an action hath accrued to the plaintiff, is not a good count in debt, and cannot be joinded in a declaration with counts in debt.

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THE plaintiff declared in debt for goods sold and delivered, with a count as follows: "*And whereas also the said defendant, afterwards, to wit, on, &c. at, &c. in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered divers other goods, wares, and merchandize of him the said plaintiff to the said defendant, he the said defendant undertook, and then and there faithfully promised to pay to him so much money as the said last mentioned goods, wares, and merchandizes were, at the time of the sale and delivery thereof, reasonably worth, whenever afterwards he the said defendant should be thereunto na-*

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reasonably requested; and the said *plaintiff* avers, that the said goods, wares, and merchandizes were at the time of the sale and delivery thereof, reasonably worth other 20l. of, &c. to wit, at, &c.; whereof the said *defendant*, afterwards, to wit, on, &c. had notice; *whereby* an action hath accrued to the said *plaintiff*, to have of and from the said *defendant* the said last mentioned sum of money, other parcel of the said sum of 100l. above demanded." There was a like count upon a *quantum meruit*, laid with an *assumpsit*, for work and labour. The *defendant* demurred specially for the misjoinder, and there was a joinder in demurrer.

COMYNS, for the *defendant*, was stopped by the court, after having cited *Rastall's Entries*, fo. 201, tit. *Debt upon sales*; et *ibid.* fol. 176, *debt for meat and drink*, in order to shew that this was unlike the usual form of a count in debt. He also referred to *Vaux v. Mainwaring*.*

ESPINASSE, *contra*, cited *Comyn's Digest*, title, *Debt*, A. (8); and *Samuel v. Iudin*, *New Reports*, 43.

LORD ELLENBOROUGH, C. J. "Here are no words of debt in this declaration, it cannot be good unless every bad count in *assumpsit* is to be considered as a good count in debt."

LAWRENCE, J. "This is a count in *assumpsit*, without alleging a breach."

ESPINASSE then craved leave to amend by striking out the counts in *assumpsit*; which was granted.

The KING against BINKER.—June 19th and 22d.

Where an indictment has been removed by certiorari, and the defendant moves to withdraw his plea of not guilty, and to demur, the costs follow the judgment, as upon a conviction.

* Fortescue, 197.

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and the motion will be granted without terms as to costs. Semble, obtaining a bill of exchange, by false pretences is not obtaining money, goods, &c. under the statute against cheats.

THE *defendant* was indicted "for that he on the 9th of August, 1802, at, &c. in the North Riding of Yorkshire, was employed by one R. L. as agent of and for him the said R. L. to contract for and agree on behalf of him the said R. L. with one John Hunter for the purchase of a dwelling-house and shop or belonging to him the said J. H. &c. situate and being in the township of, &c.; and that afterwards, to wit, on, &c. at, &c. the said *defendant* contracted and agreed with the said J. H. for the said dwelling-house and shop, &c. at or for the price or sum of 47l. of, &c.; and that the said *defendant* being a person of evil name, &c. and falsely contriving unjustly to cheat the said R. L. and fraudulently to obtain from him a greater price or sum than he the said *defendant* had contracted and agreed to pay to the said J. H. for the said dwelling-house and shop with the appurtenances, afterwards, to wit, on, &c. at, &c. with force and arms falsely, fraudulently, and deceitfully did obtain from him the said R. L. one bill of exchange of the value of 112l. of, &c. then and there drawn by him the said R. L. upon Messrs. B. S. and L. bankers, in London, and payable to him the said *defendant* or order, and which said bill of exchange is in the words and figures following, &c. [here the bill was set out] and which said bill of exchange was duly honoured and paid to the order of him the said *defendant* accordingly, by then and there falsely and fraudulently pretending that over and above the sum of 55l. of like money, which he the said R. L. then and there owed to the said *defendant*, on other accounts and considerations he

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the said *defendant* had then and there contracted and agreed to pay to the said J. H. for the said dwelling-house and shop with the appurtenances, the sum of 57l. of like lawful money; whereas, in truth, he the said *defendant* then and there had not contracted and agreed to pay to the said J. H. for the said dwelling house and shop the sum of 57l. but, on the contrary, had contracted to pay for the same the sum of 47l. of, &c.: and so the jurors aforesaid present that the said *defendant* did at the time and place aforesaid, and in manner aforesaid, cheat and defraud the said R. L. to the great deceit and damage of the said R. L. &c.

An objection was taken, that this indictment did not state any offence of a public nature, or a deceit effected by a false token, but a breach of a private contract only.

WALTON, therefore, in the last term, moved that the *defendant* might be at liberty to withdraw his plea of *not guilty*, and demur to the indictment; which being granted, and the demurrer now coming on to be argued,

Lord ELLENBOROUGH, C. J. said to the counsel for the crown, "This is an offence against the statute, and it is not alleged *contra formam statuti*: how can you get over that objection, even if there were no other difficulty in your case?"

RAINE acknowledged that he was afraid it was only the subject of an action for a deceit. He added that there was some difficulty, in the country, as to indicting the *defendant* upon the statute; because he had received, not actually goods, wares, and merchandizes, but merely a bill of exchange, and it was doubted whether that was within the statute.

JUDGMENT for the DEFENDANT.

1802.

—
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BINKER.

On the motion, as stated above, and which was argued on Wednesday the 19th of June,

TOPPING, for the *crown*, contended that, as the indictment had been removed, by *certiorari*, to the assizes, without notice to the prosecutors, and although notice of trial had been given and a special jury been struck by the *defendant*, yet the trial had been put off, this rule ought not to be made absolute unless the *defendant* paid the costs of going down to trial.

PARK, for the *defendant*, said, that it was not through the *default* of the *defendant* that the trial was put off; and as a recognizance was entered into to pay costs to the amount of 40l., and the *defendant*, if convicted, would be subject to the whole of the costs, there could be no ground for demanding these terms.

THE COURT held that the parties would be in the same situation upon the judgment on the demurrer, as upon the conviction, if it were against the *defendant*; and therefore, without imposing terms, made the

RULE ABSOLUTE.

CLARK *against* GRAY.* July 1st.

MARSDEN *against* GRAY.

In assumpsit, in the common form, against a common carrier for not delivering a box delivered to him to be carried safely, the plaintiff, if the defendant proves a notice not to be ac-

* This case was argued in Trinity Term 1802 by the present Solicitor-general for the plaintiff, and by Holroyd for the defendant. *Izett v. Mountain* was then decided, and it stood over, and was ordered to be re-argued this term, on account of the absence of Mr. J. Grose, at the former argument.

mountable for more than 5*l.* unless the goods are entered according to their value, may recover the said 5*l.*; although the declaration contains no special count in assumpsit, upon the notice for 5*l.*

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THE DECLARATION in this case, in *Trinity Term*, 41

G. III. in the usual form, stated, that "before and at the time of making the promise and undertaking of the *defendants* hereafter next mentioned, and afterwards, they the said *defendants* were the owners and proprietors of a certain stage-coach called the *True Briton*, for the carriage and conveyance of passengers and their reasonable luggage for hire, from the city of *London* by and through a certain place called *Market Harborough* in the county of *Leicester*; and the *defendants* being such owners and proprietors of the said coach as aforesaid, heretofore, to wit, on the 19th *February*, 1801, at *London*, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, in consideration that the *plaintiff*, at the special instance and request of the *defendant*, had then and there caused a place to be taken in the said coach of them the said *defendants*, for *Elizabeth* the wife of the *plaintiff*, as an inside passenger in the said coach, from the city of *London* aforesaid, to *Market Harborough* aforesaid, for the 21st of *February* in the year aforesaid, and had then and there, to wit, on the said 19th *February*, in the year aforesaid, at *London*, &c. caused to be paid to the *defendants*, a certain sum of money, to wit, the sum of 1*l.* 1*s.* 6*d.* of lawful money of *Great Britain* for the fare of the said *Elizabeth*, as such inside passenger, and had also then and there caused to be delivered to the *defendants*, so being such owners and proprietors of the said coach as aforesaid, a certain box, containing therein divers goods and chattels, to wit, ten muslin gowns, &c. of him the said *plaintiff*, of a large value, to wit, the value of 40*l.* of like lawful money as and for the reasonable luggage of the said *Elizabeth* as

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such inside passenger as aforesaid, and to be safely and securely carried and conveyed by them the said *defendants*, by their said coach, from the city of *London* aforesaid, to *Market Harborough* aforesaid, and there, to wit, at *Market Harborough* aforesaid, to be safely and securely delivered for the said *Elizabeth*, they the said *defendants* undertook, and then and there faithfully promised the *plaintiff* safely and securely to carry and convey the said *Elizabeth* as such inside passenger, and the said box and its contents aforesaid, by their said coach on the said 21st *February* in the year aforesaid, from the city of *London* aforesaid, to *Market Harborough* aforesaid, and there, to wit, at *Market Harborough* aforesaid, safely and securely to deliver the said box and its contents aforesaid for the said *Elizabeth*: and the *plaintiff* in fact further saith, that although the *defendants* afterwards, to wit, on the same day and year last aforesaid, at *London*, &c. took and received the said *Eliz.* into the said coach, to be carried and conveyed therein as such inside passenger as aforesaid, and although the said box and its contents aforesaid were then and there reasonable luggage for the said *Elizabeth* as such inside passenger in and by the said coach, and the *defendants* then and there had and received the same as such reasonable luggage aforesaid, yet the *defendants* not further regarding the said promise and undertaking so by them made in manner and form aforesaid, but contriving and fraudulently intending, &c." did not &c. assigning a breach in the not safely and securely carrying the said box, so that the same was wholly lost.

The cause was tried at *Guildhall, London*, before Lord ELLENBOROUGH, C. J. when it was proved, that the *plaintiff's* wife going as passenger in the *defendant's* coach, went in the evening with the box, which was marked with the word *passenger*, and

took her place, and delivered the box at the office. On the part of the *defendants*, the loss of the box was admitted; but it was proved that the box was not booked; and a board was produced which was hung up in the office containing the following notice: "Take Notice, that no more than 5*l*. will be accounted for, for any goods or parcels delivered at this office, unless entered as such, and paid for accordingly," which must have been seen by Mrs. Clark, when she took her place. Cards were also produced containing another notice not to be answerable for goods of 5*l*. value, but these were not seen by Mrs. C. Upon which there was a verdict for the *plaintiff* for 5*l*. subject to the question whether the special agreement should not have been set out in the declaration: it being insisted, on the part of *defendant*, that the declaration did not apply, and on the part of the *plaintiff* that the *defendants* should have paid the 5*l*. into court. A rule was accordingly obtained to shew cause why a nonsuit should not be entered, which came on to be argued now.

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MARRYAT, for the *plaintiff*. "The question is, whether the declaration in this case is sufficient. The notice is not in the common form. It is a limitation of the damages, rather than a variation of the contract; it is no qualification of the legal liability of the carrier. But if the objection to the declaration is good, it must be upon the ground that this is a material variance. Here is no engagement to pay money *ad valorem rei*, stated in the declaration. It is only that the *defendant* undertook to do that which the law binds him to do. He has separated the limitation as to damages from the rest of the contract; and it is open to him on this declaration to shew that limitation; it is the same as if in a declaration for work and labour, and materials found, the damages are laid at 10,000*l*. and the defence is that the *plaintiff* agreed that the price should not

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exceed 6,000*l.* in such a case payment of that sum into court would be admitted, and would not preclude the defence.

GROSE, J. "Does not the notice alter the contract?"

MARRYAT. "Not unless it makes an alternative contract."

GROSE, J. "In many cases the carriers say they will not pay any thing in case of a loss above 5*l.* Must you not state the whole of the contract?"

MARRYAT. "If the notice precluded all liability, there would be no question as to the payment of money into court."

Lord ELLENBOROUGH, C. J. "The contract of carriage, and all that relates to it, is fully stated in this declaration. The other part of it, limiting the responsibility of the party is, you say, to go to the jury in reduction of the damages, but is not necessary to be stated in the declaration. There was no money paid into court in this case. If this, or somewhat similar, had been a contract of sale, would it have been necessary to state this agreement? Is it not enough to state the mere covenant on which you assign your breach? you are not obliged to state all that may come on the other side. If it had been a part of a proviso, then it would have been necessary to have stated it: but it seems to be no proviso, but is like a separate and independent covenant."

MARRYAT. "There is great inconvenience in the admitting the payment of money into court to be an admission of the whole count in the declaration. Even on a declaration for a total loss on a policy of insurance, it is just as reasonable to say that the payment of money into court admits the count, and

thereby admits the total loss, as that a payment of the 5*l.* in this case would be an admission of the liability of the *defendant* for the whole loss. So in a declaration for 50*l.* for goods sold, payment of 20*l.* into court should seem to be an admission, yet the party may pay money into court."

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LORD ELLENBOROUGH, C. J. "May it not be stated in every case of a contract of carriage that the contract is, 'I will either take the goods and carry them safe, or else I will pay you the value;' and upon the same principle ought you not to state the whole of this contract in the alternative, that each person undertakes to do a certain thing?"

HOLROYD, *contrà*. "Time to plead was obtained in this case until *Yate v. Willan** was decided; the maxim *stare decisis*, therefore, applies most strongly to this case. If the *plaintiff* had stated this part of the agreement, the *defendant* would have pleaded a tender, which he could not do upon the promise as laid; and at the same time the decision in *Yate v. Willan* would prevent him from paying the money into court. This is therefore a part of the contract which ought to be stated. The promise in the other alternative is to carry safely and securely, and not to pay the value; for a man may be liable for more than the value, as for a consequential damage, in respect of goods not arriving at a particular time."

LORD ELLENBOROUGH, C. J. "That would only vary the form of laying the promise; instead of being a promise to pay the value of the goods, it would be an action upon a promise to pay such loss as the *plaintiff* should sustain in that case."

HOLROYD, "The action upon the case is founded upon the delivery to the carrier, and the rest is infer-

* 2 *East's Reports*, 128.

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ence of law merely. The contract is not, as has been said, a promise to carry the goods safely, or else to pay the value of the goods, for the words in the notice 'not exceeding the value of 5*l*.' vary that contract. In some cases the notices are so expressed as to take away the liability of the *defendants* in all events; and in this the notice must at least vary the contract. If the contract is the same, the responsibility must be the same. These words in the notice amount to a proviso, the same as if they were stated in a deed, by way of proviso. In case of a covenant in these words, 'I will not plough up any pastures, but if I do, I will pay 5*l*. per acre,' this would be a variance on *non est factum*."

LORD ELLENBOROUGH, C. J. "That depends upon whether it is a distinct covenant. There is a great deal of inconvenience in every case at present which respects carriers; but if a *plaintiff* is, before he ventures to declare, to hunt over all the offices to find the board which is to contain the special agreement, I know not where the inconvenience is to end."

MARRYAT, in reply. "As to the inconvenience of paying money into court, or pleading a tender, the *defendants* might have stated, in a special plea, an agreement that the damages were limited between the parties, and that the damage was tendered. In the case of plowing up land, if it is intended to give the tenant the option, he might be sued only upon the penalty; but if to give both the option, then he might be sued either upon the general covenant or the penalty. If, therefore, the goods are delivered to be carried, or not, at the option of the carrier, then he can be sued only upon the penalty of 5*l*. but if not at his option, then the *plaintiff* may sue upon the general liability, for it was his intention that the goods should be carried. If the argument for the

defendant is to prevail, no declaration, upon the general undertaking, or the general custom of the realm with respect to carriers, can be good."

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GROSE, J. "I will never agree that it is so much a notice in general to the public to limit the carrier's undertaking that all persons are cognizant of it without express notice proved. A man may carry the box who cannot read. I am of opinion, that there ought always to be a special acceptance."

LORD ELLENBOROUGH, C. J. "However I may be inclined to consider this part of the agreement as collateral, yet after the decision in *Yate v. Willan*, it is necessary to consider of it. Have you, Mr. *Holroyd*, any instance where an action has been brought upon the general covenant where there has been a penalty? Pleaders were formerly in the habit of stating much more of a deed, in every declaration upon a deed, than it is usual to state now. Lord *Mansfield* wishes the parties to confine themselves to those parts of deeds which are just sufficient to shew their claim."

Afterwards, on *Wednesday*, the 19th of *June*,

HOLROYD referred to several cases, in support of a position which he had incidentally laid down in the argument, that upon a covenant with a penalty, the *plaintiff* might declare either generally or for the penalty. In *Lowe v. Pears*,* Lord *Mansfield* says, there is a difference between covenants in general terms and a covenant in a penalty. In the latter case the *plaintiff* may either bring his action on the penalty, and in that case he cannot recover more than the penalty, or he may go on the general covenant to

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recover damages *toties quoties*. So in *White v. Sealey*,* Lord Mansfield put the question, whether there was any thing collateral to make the security liable for more than the penalty, for he thought that might make a difference. He cited also 14 *Viner's Ab.* 460, title *Interest*, placitum E. and also *Kirwan v. Blake*,† in *Chancery*. There, where a bond was taken as a collateral security, there was a decree for more than the penalty.

Lord ELLENBOROUGH, C. J. “ Was not that question fully considered and settled in *Lord Lonsdale v. Church*?‡”

HOLROYD. “ There were two cases lately in the court of Chancery,§ *Tew v. the Earl of Winterton*, Knight v. *Macklean*,¶ where it was held that upon old bonds, where there was nothing collateral, interest could not be given beyond the penalty. And in *Wild v. Clarkson*,|| where all the cases are collected it is held that you cannot go beyond the penalty where there is nothing collateral. But there is nothing to deny the doctrine that it may be given where there is a collateral covenant. On an entire covenant, the declaration is a variance, unless the whole is stated.** Where there is a promise to do several things, the declaration will be bad unless all are stated.”

Lord ELLENBOROUGH, C. J. “ That is contrary to modern practice.”

And now, 1st July, 1805, The opinion of the court was delivered to the following effect by

* Dougl. 49.

† 2 *Brown's Parl. Cases*, 333, 1721.

‡ 2 *Term. Rep.*

§ 3 *Bro. Cha. Ca.* 489.

¶ *Ibid.* 496.

|| 6 *Term. Rep.*

** *Godbold*, 154; *Aleyn*, 5; 1 *Barn. K. B.* 303.

LORD ELLENBOROUGH, C. J. *after stating the case*:
 "It was contended, on the authority of *Yate v. Willan*,* that the agreement should have been stated specially. There existed in that case, in point of fact, a special notice, whereas the declaration was in the usual form on the *assumpsit* arising out of the general usage; but 5*l.* having been paid into court, the *defendant* was held to have admitted the *plaintiff's* right to have been as there laid, and to be excluded from giving the notice in evidence. On the part of the *plaintiff*, however, it has now been insisted that the provision in the notice, to be accountable for no more than 5*l.* unless the goods are entered and paid for as such, amounts only to a limitation of the damages to be recovered, and not to a qualification of the contract. Whereas, it is on the part of the *defendants* insisted, that it is a limitation of the promise itself, and that it varies the responsibility arising from the custom of the realm, on the undertaking of the carrier; that it is not to be considered as an independent proviso, but as a qualification of the contract, and as part of it. But if the contract to carry safely does not depend upon the amount of the responsibility, and if the carrier is liable to pay at all, whether the amount of the liability is much or less, its operation and effect is only after the contract is at an end, and the proper office of it is to limit the assessment of the jury, on the damages, in consequence of this liability; its effect resembling in some degree a covenant, in a lease, not to plough up ancient meadow land, with a distinct proviso, that in case the lessee does so, he shall pay 5*l.* per acre. In such case it is at the option of the lessor to declare on the covenant not to plough up the land, or upon the proviso, in the distinct and substantive part of the same lease. It is

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* 2 *East*. 128.

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no more necessary to state every part of an agreement not under seal, than it is of an instrument under seal. It is sufficient in either case to state so much as describes the duty which is to be performed, and the consideration for it; with this difference, that the consideration must be stated, and not part of the consideration. In the present case, the entire consideration is stated, namely, the delivery of the goods to be carried for a reasonable hire and reward. The cases in *Godbolt*, 154, and *Aleyn's Reports*, 5, which have been referred to, in order to shew the necessity of stating the whole promise are not like this case. In the case in *Godbolt*, "a man, in consideration of marriage, doth assure and promise, several things. For the non-performance of one of them, the party to whom the promise is made bringeth an action upon the case, and to enable him to the action, says that the *defendant*, in consideration of marriage, did promise to perform the said thing for which the action is brought, without speaking of the other. And upon *non-assumpsit, modo et forma*, pleaded, the opinion of the court was, that it was a good issue. For the contract being entire, if it be not a good plea, the *defendant* might be charged for the several things, which cannot be, being but one contract, by word: but it is otherwise of several contracts in writing."* In these cases the marriage, and the several things to be done in respect thereof, seem to be considerations; and if the declaration does not state the consideration of the promise on the one side, the promise itself is entirely and defectively stated. Here the proviso is no part of the consideration; the proviso only applies, after, by the default of the party, the promise is broken.

* The case in *Aleyn* is as follows: in an *assumpsit* the *plaintiff* declares that the *defendant*, in consideration of marriage, *inter alia*, *promisit de payer tant; et puis verdict pro-*

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Had the proviso been specially pleaded it could not have been pleaded in bar to the action generally, but only against the *plaintiff's* recovering more than 5l. There are a great many cases of contracts not under seal, containing many articles to be performed by both parties, which are every day declared upon in the form of an action for work and labour; yet the *defendant* is only permitted to give the articles on the other side in reduction of the damages. If it were required to do more, it would be difficult to state to what extent the inconvenience might go, particularly in cases of contracts upon charter parties and builders-contracts, and the like, in which the *plaintiffs* rely universally upon that part which is necessary to make out the claim of the *plaintiff* in the first instance. The rule is, that as much of any contract of distinct parts as contains the consideration entire, and also the entire act to be done in respect of such consideration, is to be set out; but that which comes on the other side, and which is to be given in evidence in reduction of damages only, is not necessary to be shewn to the court in the first instance. If it goes in discharge altogether of the action, it may be given in evidence upon the general issue, as in the case of *Clay v. Willan*.* The notice there was, that the goods would not be accounted for at all, and that was not properly in reduction of damages, but in bar of the action altogether. That case was therefore rightly decided,

querente; Judgment fuit done vers luy, because he ought to set forth the whole promise, which is entire.

It may not be improper to observe that at the time when these cases were decided, and they are but loose notes at the best, *assumpsit* for work and labour generally had not begun to be in use.

* 1 H. Bl. 298.

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for that notice amounted to an actual extinguishment of the contract; but this does not admit the contract to carry safely to be extinct, but is only a restrictive provision as to the damages. The *plaintiff* is therefore entitled to retain his verdict for 5l. there having been no money paid into court."

RULE DISCHARGED.

RUSHFORTH and Others against HADFIELD and Others.—May 20.

Semble, carriers have not at common law a general lien for a balance.

Where evidence of usage is given to shew the existence of such a lien, it must be left to the jury as evidence of mere usage of trade, not of general custom or common law, which indeed requires no evidence to prove it; but as importing an agreement between the contracting parties, in the ordinary course of trade.

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THIS was an action of *trover* against the *defendants*, who were common carriers at *Halifax*, to recover the value of certain goods of the value of 80l. detained by them after a tender made of the price of the carriage: but they refused to deliver the goods until they were paid a general balance of 23l. 18s. due to them from the consignee of the goods. The cause was tried at *York*, at the last *Lent* assizes, before GRAHAM, B. when the question turned wholly upon the *defendant's* right to detain the goods on their lien for a general balance. The *counsel* for the *defendant* cited a *nisi prius* case of *Aspinall v. Pickford*, in which Lord Kenyon had ruled that the common carriers have a lien for a general balance, and *4 Burr.* 2221, in which Lord Mansfield held that the convenience of trade would induce courts to lean in favour of liens. But on the other side, it was

suggested that the case of *Oppenheim v. Russell*,* had overruled or shaken that decision : yet as it appeared that the case of *Oppenheim v. Russell*, had decided only that the right of the consignor to stop in transitu would not be affected by the claim of the carriers, the learned judge thought that the opinion of Lord *Kenny* was not contravened thereby ; and as it appeared upon further inspection of the case, that it was not a decision of Lord *Kenny* upon the law, but that he permitted the jury to find the fact of a general lien, upon the evidence of one *Russell*, a great carrier, and of another ; the counsel were in this case permitted to proceed to give evidence of the usage of carriers as to detaining for a general balance. A witness was then called, who was clerk to the *defendants* ; he said, " The *Rushforths* were indebted 23l. 18s. Our custom has been to detain for the balance if there was any suspicion of failure." He also gave two instances of detention upon such lien. The first time was in 1803, the 9th of *May* ; and on the 23d, they had detained other goods. Another witness had been a carrier 20 years. " He remembered having been paid a general balance after a failure, but did not remember whether it was contested ; 54l. 17s. was due for the goods delivered in *Lincoln*. He collected the money every month. He stopped a truss, and the owner came and paid for it, and a few days afterwards became a bankrupt." Two particular instances were given by a *Leeds* carrier : " He had been a carrier 20 years. He said carriers always detain for a general balance. They could not collect for each journey. Actions have been threatened by the owners, but were never brought." The *Lincoln* carrier had stopped goods of the value of 1000l. for a balance of 132l. Upon this, the counsel

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* 3 Bos. & Pull. 482.

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for the *plaintiff* contended, that there was not sufficient evidence to prove the general usage of trade; but that it was setting up a general custom against the general custom or law of the land.

The learned judge said, that by the authorities cited, his mind was very much balanced upon the question of law; but he thought it contradictory to admit evidence of usage, to prove a general usage which amounts to common law; and he said to the jury that his direction was, that carriers had such a lien; and if they believed the usage, they should find for the *defendants*. The jury accordingly found a verdict for the *defendants*, whereupon a rule was obtained in last *Easter* term, to shew cause why there should not be a new trial.

PARK and WOOD, for the *defendants*, shewed cause, and cited *Aspinall v. Pickford*,* 9th June, 1800, before Lord Kenyon, C. J. in which case there was a verdict for the *defendant*, upon the evidence of only two witnesses, as to the general usage. They proved it to be the general custom of carriers, to detain for a general lien; but they gave only two particular instances.

LORD ELLENBOROUGH, C. J. "Are there any dates as to the particular instances here, prior to *Aspinall v. Pickford*?"

PARK. "Some speak as to ten years ago.†"

LORD ELLENBOROUGH, C. J. "I find no specific instance, till after that case. Some speak as to instances in 1803."

* 3 Bos. and Pul. 44, in notis.

† Wood said that he would not charge his memory with any particular instances, but these witnesses spoke generally to usage of twenty, or at least ten years.

LAWRENCE, J. "It is part of the custom of the realm that carriers shall detain for the carriage of specific goods, because they are bound to carry for a reasonable hire. The claim of the carriers now is, to have a general lien for all balances, and yet to cut down their liability, by constructive notices. This may perhaps require the interference of the legislature. The right to stop the goods for the specific price of carriage is admitted, but it should seem that they can only acquire a larger right by special contract, and by that means they may acquire a general lien for a balance. If they are to have this right, and to set up a certain custom, qualifying their liability, it will constitute a very different obligation on the carrier than that which is stated in the law books."

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PARK. "There may be many inconveniences in a case, as in *Oppenheim v. Russell*, where the rights of third parties intervene, which do not occur in this case. It is a great convenience to the party not to be called upon to pay for every parcel; the carrier will then have a right to stop the last parcel of goods, and that is not likely to occur until a failure happens. In *Oppenheim v. Russell*, the court avoided deciding this question, although they certainly had an inclination against the right of general lien. In *Aspinall v. Pickford* only two witnesses were called, and in *Naylor v. Mangles** only three witnesses were called."

LORD ELLENBOROUGH, C. J. "That case was not presented to Lord *Kenyon's* mind as setting up a custom against the general custom of the realm; he considered it as a mere usage of trade. I do not know how the case of *Aspinall v. Pickford* ended: I was surprised that I heard nothing more of it."

* 1 *Espinasse*. 109.

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COCKELL, Serjeant, *contra*. "The direction of the learned judge, that it was his opinion that the defendants had such a lien, prevented the question of usage from going sufficiently to the jury. No usage was proved in the case, and no instance was given beyond five years ago. Two of the witnesses were servants of the present defendants, and the other witnesses could give no particular instance. This was taken in proof of a custom throughout the realm; for it was not adopted as the contract between the parties. I cited the case of *Oppenheim v. Russell*, for the *obiter* opinion of the court as to this subject. The case of a dyer is very different, because he can refuse to take the goods to dye. Here, besides that a carrier is bound to carry for hire, the rights of third persons, the consignees, are always concerned. Lord Alvanley doubted whether they could create such a lien."

LAWRENCE, J. "They do not contend that they can detain against one man for the balance due from another; they only contend that they have a right to detain against the person who is to pay the carriage. Where the consignor sends goods the consignee is to pay."

LORD ELLENBOROUGH, C. J. "We think there has not been any such evidence as would go to establish an agreement between the parties in the particular case, and that the general lien does not exist in the common law. By the common law, the lien grows out of the custom of carriers, which is, to carry all persons' goods for a reasonable hire, to be therefore paid. Under the words 'to be therefore paid' the carrier derives a right of detaining the goods, until he shall have been paid the hire of that particular journey. What then have they derived further from usage? I do not on any occasion say that there may not be an usage, instead of detaining each particular parcel, to let that go by and detain a particular parcel for the whole, when it may

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be necessary so to do. But if there is to be evidence, applying to the general trade, it ought to be better evidence. The way in which usages of trade are applied is this: Persons are supposed to be cognisant of the courses and other things generally relative to that trade, and to incorporate into the agreements which they make all such terms as are generally and universally adopted in similar agreements. And if the *defendants* generally dealt with others upon the terms of having a general lien, and other carriers have generally so dealt, then it may be inferred that all these articles upon which the balance has accrued, have been delivered out to the *plaintiffs* upon those terms, and this may be proof that the *defendants* dealt with them according to their practice with others, and that the *plaintiffs* have agreed to such a lien. It was not, however, so left to the jury. If it had been, there would have been some difficulty in saying that the verdict was against evidence. In cases of this sort, the witnesses must condescend upon particular instances, for it might happen that the parties might question them. One instance here stated is, where they stopped goods of 1000*l.* value for 190*l.* that instance is material; but that is only one instance. There is nothing like an usage of trade incorporated into the agreement of the party. The source here is not taken high enough; it ought to have been more general and more clear."

GROSE, J. "I should not have been sorry to have said in this case, as there is no injustice done, that the rule should be refused; and I should do so, were it not for fear it would be cited hereafter and probably cited in some case in which it would be erroneously supposed that it laid down a general rule, when in fact it was not intended to do so. The common law and custom must be coeval with the custom by which the carrier is bound to carry the goods of all persons, and the evi-

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dence does not amount to a proof of any such universal custom. Nor is there here full and clear ground to infer that there is a general lien from the usage of the trade. As to the usage or agreement between the parties, that has not been left to the jury. And therefore, when I consider that this case may be cited as law hereafter, I do not think there is sufficient for me to found my opinion upon, and I should wish to have it referred again to the jury before I deliver my opinion."

LAWRENCE, J. " I think that there ought to be a new trial. The carriers are endeavouring to alter considerably that situation in which they have been placed by the law. They are persons taken notice of by the common law, and are to take their business according to the custom of the realm; but they are now endeavouring perfectly to alter that custom. They take upon themselves to carry almost as they please. A common carrier is considered by the law as contracting to carry safely for a reasonable consideration, and he is bound therefore to take reasonable care of the goods; he is bound to be answerable against all accidents, but the act of God and the king's enemies. For that reason he is not bound to deliver his goods until he is paid the carriage.—What reason is there for altering his general character? I do not mean to say that by special agreement a right may not be created different from that which the common law gives; but such a right, as is now contended for, does not arise out of the common law, nor is it such an one as the *defendants* can invest themselves with, by a general custom, but it must arise out of the agreement between the parties. It is said that it is very convenient to trade; and so it may be: but though it is so, still it must arise out of the contract of the parties, and we must have evidence of such a contract in some shape or other. I do not mean

to say that it does not even exist in this case, it will be time enough to decide it when the question arises. The carrier may certainly say to the consignee, I will not deliver the parcels to you unless you will enter into a new agreement with me; and the consignee may then agree with the carrier thus: 'In consideration that you will give up your right to stop in each individual case, as the price of carriage accrues, you shall have a right to stop any particular parcel for the whole.' This, however, is not the law of the land, but the consequence of an agreement; and for the purpose of proving it, usage of trade may be resorted to, as evidence of an agreement between the parties. Whatever is usual, is implied in such agreements, for it would be ridiculous to suppose that persons in trade should wish to have those things which are usual repeated to them every day, and we infer that they have them always in their minds. Is the usage in this occasion so uniform that there is evidence of such a general contract? Certainly not; and it ought at least to be left to the jury to say, whether this was the express or implied contract between the parties."

LE BLANC, J. "I doubt whether the jury had this cause presented to them in the true light in which, in point of law, it ought to have been put. It was left to them as the indisputable usage of the land arising from general and ancient usage. But here is no evidence of more than three or four years ago. And as to the circumstance of the stoppage of a parcel of 1000*l.* value, that weakens the force of it. For when they detained 1000*l.* worth of goods for 130*l.* the party would rather pay 130*l.* and get the goods again, than wait to go into a court of law. It is fit that it should be put upon its true ground, and be presented to the jury in that form in which, as it strikes me, they should consider it. I will not say, till the

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case is determined that carriers have not a general lien, but one may be permitted to say, that, at present, I know of no case which decides that they have."

GROSE, J. "As to the question of whether there is a general lien or not, it is very extraordinary that resort should have been had to particular evidence of usage, if it could be supposed that such a lien existed at common law."

RULE ABSOLUTE.

ANONYMOUS. *Note to a Prisoner.*—May 16.

A promissory note to pay a prisoner his sixpences is valid, though it does not state the style of the court in which the action against him is brought; therefore that circumstance will not entitle him to his discharge.

Note to a
Prisoner.

MARRYAT, on behalf of a prisoner who came up to be discharged under the lords' act, objected that the note which had been given to him did not state the style of the court of King's Bench or of any court.

GROSS, J. said that he could see no inconvenience that could ensue to the defendant from this defect, and therefore it was good.

PRISONER REMANDED.

The KING against SKONE.—June 29, 1805.

No appeal lies to the sessions from a conviction by two justices for an offence under 42 Geo. III. c. 38; s. 30; notwithstanding the act contains a general clause of reference, to all former excise laws, and incorporates all the powers and provisions of 12 Car. II. c. 24, and of all other laws relating to the excise or inland duties, under the management of the commissioners of excise for the managing, raising, mitigating, and levying the duties by the said act 42 Geo. III. c. 38.

THE *defendant* was convicted before two justices of the county of *Somerset*, in a penalty of 200l. under the 42 Geo. III. c. 38; s. 30. For that he within three months, then last past, to wit, on, &c. at, &c. did wet, water, and sprinkle, and cause and suffer to be wetted, watered, and sprinkled corn and grain of his the said *defendant*, then and there making into malt, whilst the same was in a certain stage of operation, (that is to say,) upon the floor after the same had been emptied, thrown out, and taken from the cistern of him the said Thomas Skone, used for the steeping of the said corn and grain, and before the end and expiration of twelve days, from the time of steeping the said corn and grain, contrary to the form of the statute in such case made and provided, whereby, &c.

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Whereupon the *defendant* appealed to the quarter sessions for the county of *Somerset*, which court quashed the said conviction, and thereupon the appeal was removed by *certiorari* into this court, upon the ground that no appeal lay to the court of quarter sessions upon such conviction.

The clauses upon which the question arose were as follows; stat. 42 Geo. III. c. 38, s. 30: No maltster shall wet, water, or sprinkle, or cause or suffer to be wetted, watered, or sprinkled any corn or grain making into malt, in any state or stage of operation after the same shall have been emptied, thrown, or taken from out of the cistern, vat, or other vessel or utensil used for steeping such corn or grain, for and until the full end and expiration of twelve days, on pain of forfeiting for each and every such offence, the sum of 200l.

Sec. 36. That all fines, penalties, and forfeitures, imposed by this act, shall be sued for, recovered, levied, or mitigated by such ways, means, or methods

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as any fine, penalty, or forfeiture may be sued for, recovered, levied, or mitigated by any law or laws of excise, or by action of debt, bill, plaint, or information, in any of his majesty's courts of record at *Westminster*, or in the court of *Exchequer* in *Scotland* respectively; and that one moiety of every such fine, penalty, or forfeiture shall be to his majesty, his heirs and successors, and the other moiety to him or them who shall inform, discover, or sue for the same.

37. That all the powers and authorities, directions, rules, methods, penalties, forfeitures, clauses, matters, and things, which in and by an act made in the twelfth year of the reign of King *Charles II.* intituled, an act for taking away the courts of wards and liberties, and tenures, in *capite*, and by knight's service and purveyance, and for settling a revenue upon his majesty in lieu thereof, or by any other law now in force, relating to his majesty's revenue of excise, are provided and established for managing, raising, levying, collecting, mitigating, or receiving, adjudging, or ascertaining the duties thereby granted, or any of them, (other than in such cases for which other penalties or provisions are made or prescribed by this act) shall be practiced, used, and put in execution in and for the managing, raising, levying, collecting, mitigating, recovering and paying the *duties* by this act granted upon beer, ale, malt, and hops, as fully and effectually to all intents and purposes, as if all and every the said powers, authorities, directions, rules, methods, penalties, forfeitures, clauses, matters, and things were particularly repeated and re-enacted in this present act.

PELL and MOORE, A. for the *defendant*, now contended, that by the 37th section of the stat 42 Geo. III. c. 30, an appeal was given to the quarter sessions; and that by the same clause the *certiorari* to remove

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the case to this court was taken away. They said that the stat. 30 Geo. III. c. 35, s. 22, the act for the additional duty on malt contains the same clause exactly, except that besides the word *duties*, it contains also the word *penalties*.

LORD ELLENBOROUGH, C. J. "Have there not been many acts since in which the word *penalties* is omitted?"

PELL. "The first act relative to *malt* is the stat. 12 *Anne*, c. 2, in that act there is an incorporating clause the same as this. By virtue of that clause, the magistrates have power to convict. By the stat. 12 *Anne*, st. 1, c. 2, s. 37, 38, an appeal is expressly given to the quarter sessions from orders or judgments given by justices of the peace, touching any penalty or forfeiture relating to that act, and no writ of *certiorari* shall be allowed or brought to set aside any determination of the said justices. The stat. 6 *Geo. I.* c. 21, s. 22, contains general words; there are other articles also, such as soap under the 23 *Geo. II.* c. 21, s. 37, and various others which are in the same predicament; but the decisions upon those cases do not apply to this, for it is difficult to understand what the clause referring to the former acts can apply to, unless it also takes away the appeal. And although in the *King against the Justices of Surrey*,* it was held that the 45 *Geo. III.* c. 72, s. 9, did not give the appeal, yet it seems from the opinion of the court there, that an appeal lay in the case of the malt duties."

LORD ELLENBOROUGH, C. J. "You must shew that this section contains words of reference applicable to the case. This act omits the word *penalty*, and has only the word *mitigate*, which can be supposed to

* 2 Term. Rep. 604.

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apply to penalties. The word *adjudging* may apply to the *adjudging* of the duties. We think the words here are as general as the subject matter; that is, only the duties. If the legislature meant any thing else, *quod voluit non dixit*.

ORDER of SESSIONS, quashing the conviction, quashed.

SALVIN and another against JAMES and another.—
 July 1st.

A policy of insurance was made for a year, in writing, with an article, that on bespeaking policies, all persons are to make a deposit, for the policy, &c. and shall pay the premium to the next quarter day, and from thence for one year more at the least; and shall, as long as the insurers agree to accept the same, make all future payments annually within fifteen days after the day limited in their respective policies, upon pain of forfeiture of the benefit thereof; and no insurance to take place till the premium be actually paid; but this was explained by an advertisement, that the office considered all persons insured by policies for a year or more, as insured for fifteen days beyond the expiration of their policies. Held, that the fifteen days are allowed only in case it is intended to renew the policy; and that if the office gives notice before, or during the fifteen days, that they will not accept the premium, and a loss happens afterwards, during the fifteen days, the office is not liable.

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THIS was an action of *assumpsit* on a promise stated in the declaration to have been made by the defendants and *Calverly Bewicke*, since deceased, that certain property of the plaintiffs, of the value of 3,000*l.* should be considered by the managers of the Sun Fire Office Society as insured against fire for fifteen days beyond the time of the expiration of a certain policy effected by the plaintiffs in that office, for insuring 3,000*l.* on the said property from the 11th day of November, 1802, to the 25th day of December, 1803: to which the defendants pleaded the general issue.

The cause came on to be tried at *Guildhall*, on the 7th of *March*, 1805, before Lord *Ellenborough*, C. J. and a special jury, when it was, at the request of the *plaintiffs'* counsel, agreed, without argument, that a verdict should be found for the *plaintiffs*, for 3,000*l.* damages, and 40*s.* costs; subject to the opinion of the court on the following case: The *defendants* and *Calverly Becke*, since deceased, were three of the managers, or acting members of the Sun Fire Office, being a society of persons carrying on business for the insurance of property against fire, according to terms of their printed proposals, a printed copy of which is to be considered as part of this case.

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OCTOBER
JAMES.

That an advertisement was published in the public newspapers by the managers or acting members, on behalf of that society, which advertisement has not been retracted, and is as follows:

Sun Fire Office, 10th July, 1794.

"In consequence of several applications, the managers of this office do hereby inform the public, that all persons insured in this office by policies taken out for one year, or for a longer term, are, and always have been considered by the managers insured for fifteen days beyond the time of the expiration of their policies; but that this allowance of fifteen days does not extend to policies for shorter periods, which cease at 6 o'clock in the evening of the day of the expiration of the time mentioned in those policies. HUGH WATTS, Sec."

That such advertisement having been so published as aforesaid, the *plaintiffs*, on the 11th day of *November*, 1802, caused to be effected in the said office, an insurance to the amount of 3,000*l.* on their cotton mill, millwright's works, clockmaker's works, carding and breaking engines, and moveable utensils mentioned in the declaration, and paid the premium and duty; and that on that occasion the policy set out in the declaration, being a policy in the common form used in the

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said office, for insuring £,000l. on the said property from the 11th *November*, 1802, to 25th *December*, 1803, was executed on behalf of the office by the *defendants* and *Calverly Bewicke*; that the *plaintiffs'* cotton-mill was stove and slated, and conformable to the rules of the first class of cotton-rates, and in the *plaintiffs'* tenure, and that they were duly interested in the premises insured; that in the month of *November*, 1803, the *defendants* gave notice to the *plaintiffs* that unless they agree to pay 1l. 18s. Od. per cent. upon the aforesaid insurance, as from the 25th day of *December*, 1803, instead of 1l. 10s. Od. per cent. which the *plaintiff* paid upon the policy in the pleadings mentioned, the *defendants* would not continue the insurance; to which notice the *plaintiffs* returned for answer, that they would not give that sum, as they had made their premises so secure. That on the 7th day of *January*, 1804, being within the period of fifteen days after the expiration of the said policy, the said insured premises were consumed and destroyed by accidental fire; that on the 8th day of *January*, the *plaintiffs* gave notice of the said loss to the agent of the *defendants* at *Durham* and wrote to the office a letter giving them a similar notice; and on the same day tendered to the *defendants'* agent the premium of 1l. 18s. Od. per cent. the then rate of insurance at the said office, for another year, and the duty; but the *defendants* by their *agents*, whose acts have been approved and ratified by the office, immediately declared that they did not consider the *plaintiffs* as insured at the time when the fire happened: whereupon no further steps were taken by the *plaintiffs*, and no money has been paid. That, when the said loss happened, the *plaintiffs* had not paid or tendered the premium for another year. The question for the opinion of the court is, whether the *plaintiffs* are entitled to recover? If they are entitled, the verdict to stand; if

not, a nonsuit to be entered. The question was stated also in the margin of the case to be, whether the *defendant's* advertisement applies to all cases where the expiring policy is for a year or more, or only to such cases where the policy is intended to continue.

The following are the printed articles, or proposals, referred to in the policy of insurance; and which are relied upon in the judgment delivered by the court. Article 1. All policies shall be signed and sealed by three or more trustees, or acting members. 3.—On bespeaking policies, all persons are to make a deposit for the policy, stamp, duty, and mark, and shall pay the premium to the next quarter day, and from thence for one year more, at least, and shall as long as the managers agree to accept the same, make all future payments annually, at the said office, within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof, and no insurance is to take place till the premium be actually paid by the insured, his, her, or their agent or agents.

RICHARDSON, for the *plaintiffs*. “It must be admitted, after the case of *Tarleton v. Stanniforth*, that under the printed proposals of the *defendants* the *plaintiffs* would not be entitled to recover; but it is agreed that this advertisement is to be taken as part of the printed proposals. By the effect of this advertisement, the insurance becomes an insurance for a year and fifteen days, during which fifteen days there was a negotiation between the parties as to the future renewal of the policy.”

LORD ELLENBOROUGH, C. J. “Was not that determined?”

PITCAIRN, for the *defendants*. “This advertisement only means that the party has fifteen days, in which to renew his policy;* it does not go to cast upon

* It was agreed between the counsel, that this advertisement.
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the office a liability which they were not subject to before; on the contrary, it refers to and qualifies the previous engagement of the *defendants*. By the policy, the *plaintiffs* were insured only till the 25th of *December*, 1803; and by the third article of the printed proposals, the assured must have paid the duty before he could be considered as being insured."

LE BLANC, J. "Is not the duty to government calculated upon the annual payment; and if this is a policy for fifteen days more than a year, ought not the government to have a further duty."

LORD ELLENBOROUGH, C. J. "Supposing a fire to have happened within the fifteen days, and a new policy to have been made out, it would be like a policy on a ship lost or not lost."

PITCAIRN. "In *Tarleton v. Stanniforth*,* it was held that the parties were at their own risk during the fifteen days, until the premium was paid; and then this advertisement was issued. But it can only be considered as applying to the case of a policy to be renewed for the ensuing year. It is here expressly stated, that the office gave notice in *November* that they would not insure again without an advance of premium. This negatives their intention of renewal, no tender having been made of the advanced premium. By the stat 22 Geo. II. c. 41, s. 12, the fire offices are to receive the duty for government for a year, and are accountable to government if they do not receive it. And the assured are, at the end of every year or within fifteen days after, to pay to the offices the duty, and in case of default of payment the policy is made void against the assured. By sec. 14, the parties

tisement should be considered as part of the agreement, though LAWRENCE, J. said, if he had gone to insure, he should have looked only to the printed proposals.

* 5 T. Rep. 695. Decided, July 4th, 1794.

are to pay a proportion of the duty for less than the year; and by sec. 15, as to insurances for a year and a fraction, the parties are liable to duty for the year and the fractional part only. By the 37 Geo. III. c. 20, the duty is increased, subject to the like clauses. With the knowledge of these clauses, and under the penalties contained in them, it can never be considered that the parties entered in to such an agreement as would vitiate the whole policy.

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LAWRENCE, J. observed that there was no count in the declaration founded upon any implied agreement that, if the parties would pay the premium within fifteen days, the office would give a policy to take effect during the fifteen days.

Cur. adv. vult.

And now the judgment of the court was delivered to the following effect by

Lord ELLENBOROUGH, C. J. after stating the case: "This question arises upon the construction of the advertisement published on the 10th of *July*, 1794; whether it is to be considered as an engagement to insure all persons who may insure for a year, for the additional period of fifteen days, without any regard to the meaning of the policy, or whether it is to be considered as having relation to the third article of the policy. The terms of the advertisement being general have furnished an argument that it operates as an independent and additional agreement for an insurance for fifteen days more than a year; and under this supposition the declaration has been framed, which states that 'in consideration that the *plaintiffs*, at the special instance of the *defendants*, would cause their property to be insured for one year, or for a longer time, the *defendants* undertook that their said property should be considered by the managers of the said society as

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insured for fifteen days beyond the time of the expiration of the said intended policy.' To this mode of construing the policy, it is objected that all insurances, by the first article of the proposals, are to be made in writing by a policy signed and sealed by the directors, and that the office never permits an insurance to be made in any other way; and that the court ought not to consider the effect of the advertisement as independent of the policy if it can be referred to it. The mode of insuring by signing policies, has been by policies referring to certain printed proposals; and by the third article thereof, 'on bespeaking policies, all persons are to make a deposit for the policy, stamp, duty, and mark, and shall pay the premium to the next quarter day, and from thence for one year more, at least, and shall, as long as the managers agree to accept the same, make all future payments annually, at the said office, within fifteen days after the day limited by their respective policies, upon forfeiture of the benefit thereof, and no insurance is to take place till the premium be actually paid by the insured, his, her, or their agent or agents.' In consequence of this article, it was held in the case of *Tarleton v. Stanniforth*, that, until the premium was paid, persons insured were not protected, and that the intention of the parties was only to continue the insurance during the fifteen days, in case the policy was afterwards effected. In the course of the argument of the case, it has been admitted by the counsel, that this advertisement was published in consequence of that decision, and to obviate any doubts arising upon it, and to assure the public that provided the assured meant to effect the policy, and a loss should happen during the fifteen days, the office would be answerable, although the premium had not been paid. That if it must be construed without the articles in the policy referring to the printed proposals, it must have the effect of annulling or altering the contract, and that they cannot

stand together. The true way of construing it is to be collected from this, that the managers in the commencement of it declare that persons insured by policies taken out for a certain term, are and *always have been* considered as insured for fifteen days beyond the time of the expiration of their policies; this must necessarily refer to the insurance before made, that is, to the policy, and shews the construction they have always put heretofore on their own instrument. It is no new insurance different from what was formerly made, but an explanation of the sense in which they understood it themselves, and which they are willing to have considered as the true construction of the policy. It will then read as if these words were added in the insurance: 'But all persons insured by policies for one year are considered as insured for fifteen days beyond the time of the expiration of the policies;' the effect of which will be, that the insurance continues beyond the year, and until the premium is actually paid; and when the premium is paid, according to the original effect of the policy; and to leave it as if nothing was said as to when the insurance took place. But still the office would have an option to refuse the premium; being in effect saying, according as the office shall agree to accept the premium, the insured shall be insured during the fifteen days. Yet as the option was intended to enable them to determine the insurance, and for the purpose of refusing to continue an insurance as long as the assured might require, what is there that entitles the *plaintiffs* now to consider this as an insurance, who were in no condition to have continued the same policy in future? The office had it at any time in their power to say, we will not insure for you beyond the expiration of the present policy; and then this advertisement could no longer operate as a contract of indemnity to the *plaintiffs*. The consideration for it, during the fifteen

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days, is the premium which may be paid for it during the fifteen days, if it is to be continued for a further period. It is therefore no longer an indemnity than while the premium may be paid; with this advantage on the part of the insured, that if a loss happens during the period of the fifteen days, the office, if it should not have determined the contract, will be liable, although the premium is not paid; this, however, does not deprive them of the power of vacating the contract, at the end of the time by a reasonable notice, before the premium is to be paid; the effect of which will be, to give the insurance for the last year of the policy, not for the fifteen days, but only for the ordinary term of the policy, the full period of a year. If it were so, to give an insurance during the fifteen days independently, a new policy, and new stamps would be necessary. The policy is for one year at the least, and for as many more as the parties please, provided they pay the premium within fifteen days, with the option for the office alone to determine it before or during the fifteen days. The policy shews that the fifteen days are not absolute. It is not an absolute policy for more than a year; and it is such as the office cannot determine during that period. It is not necessary to say, whether it can be made by parol. In this case, there has been a determination of the policy, by the refusal to accept the premium, and therefore there must be

JUDGMENT for the DEFENDANTS."

**THE COMPANY of PROPRIETORS of the LIVERPOOL
WATER-WORKS, against WILLIAM ATKINSON.—**

June 18th.

A bond, by a receiver of rents, reciting in the condition that he had agreed to collect rents for a certain company for twelve months, and that the company having required security for

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the due performance of the said office, in manner or to the effect after mentioned, that A. B. had agreed to become surety for him, in the condition afterwards, contains more general words binding him to his faithful service, during such time as he shall be employed by the said company and their successors: held, upon demurrer, that the recital restrains the operation of the general words of the condition, and that it is not forfeited by any breach of duty, after the expiration of the twelve months.

THE *plaintiffs* declared against the *defendant* in debt on bond for 500l. with a condition, whereby, after reciting that the said *defendant* had come to an agreement with the said *plaintiffs* to collect, get in, and receive the several rents, and other revenues arising and to arise from the said *plaintiffs*' works and undertakings in and near *Liverpool* aforesaid, from time to time for the space of twelve months, from the date thereof; and that the said *plaintiffs*, having required security for the due performance of the said office of receiver in the manner or to the effect after mentioned, *Thomas Harpley* had agreed to enter into and join him the said *defendant* in the said writing obligatory for that purpose, with and upon the condition thereunder written, it was thereby declared that the condition of the said writing obligatory was such that if the said *defendant* should and did from time to time, and at all times thereafter, during the continuance of such his employment, use due diligence in collecting and receiving all rents and sums of money which should annually* grow and become due to the said *plaintiffs*, their successors or assigns, at and within *Liverpool* aforesaid, from or in respect of their said undertaking, and did and should, as often as he should be thereunto requested by the said *plaintiffs*, their

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* This word was omitted in the declaration, but appeared in the bond on its being set out on *oyer*.

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successors or assigns, or by the said *plaintiffs'* committee at *Liverpool* aforesaid, well and truly pay, or cause to be paid and accounted for unto the said *plaintiffs* at *Liverpool* aforesaid, to their satisfaction, or to the satisfaction of the said committee, all such sum and sums of money as he the said *defendant* should have had and received of or from any person or persons to the said company's use, and render to the said *plaintiffs*, their successors or assigns, or to the said committee from time to time, a true, just, and perfect account in writing of all and every sum and sums of money by him theretofore had and received, of, from, or on account of the said works, for the rents and other revenues thereof, or of, or for, or on account of the said *plaintiffs*, their successors or assigns, and for which he should or ought to be charged or chargeable; and should then also deliver up unto the said committee all books of account, and other accounts, papers, writings, and vouchers whatsoever, relating or belonging to the said *plaintiffs*, and which should then be in his hands or custody. And also if the said *defendant* should and did so long as he should continue and be employed by the said *plaintiffs*, from time to time, observe and perform the orders and directions of the said committee, as far as the same should concern or relate to his said employment. and justly and truly in all other respects behave himself in the said office or employment of receiver of the aforesaid rents and other revenues, and duly account for the same as aforesaid, then the said writing obligatory was to be void, or else to be and remain in full force and virtue. The *plaintiffs* then averred that the said *defendant* continued and was employed by the said *plaintiffs* in the said office, for a long space of time after the making of the said writing obligatory, to wit, from the date thereof until and upon the 14th day of September, 1804, to wit, at, &c. that during that time divers large sums of money from divers persons

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to the said *plaintiffs*, the amounting in the whole to a large sum of money, to wit, the sum of 400l. of &c. and a breach was then stated in not accounting for and paying the said sum of money, whereby the said obligation became forfeited, and an action accrued to recover the said 500l. the penalty. To this the *defendant* after setting out the condition pleaded that for the space of twelve months from the date of the said writing obligatory, he the said *defendant* did use due diligence, &c. and at the end of the said twelve months duly delivered up his papers and accounts, stating in the terms of the condition a due performance thereof during the twelve months. The *plaintiffs* by their replication set out particularly a breach of the condition after the twelve months; to which the *plaintiffs* demurred: and thereupon the *defendant* joined in the demurrer.

RICHARDSON, in support of the demurrer. "The general words of this condition must be restrained by the recital; by which it appears that the agreement to make the *defendant* receiver for the company is only for twelve months; and there are no words to shew that it was the intention of the company to employ him longer. The obligation is, that he shall during the *continuance* of such his employment use due diligence, &c.; the word *such* therefore refers to the recital, and confines the operation of the condition to the period mentioned therein." In support of this position he cited *Stanton v. Day*,* *Stubbs v. Clough*,† *Lord Arlington v. Merricke*,‡ and *Wright v. Russell*.¶

CLARKE, J. *contra*. "Although the words of the recital shew an agreement to employ the *defendant* as a receiver for twelve months, yet there is nothing to shew that he was not to be continued in the employ-

* *Allyn*, 10; *Style*, 14. † 1 *Str.* 227.

‡ 2 *Saunders*, 411. ¶ 3 *Wils.* 530; 2 *Bl. Rep.* 334, S. C.
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ment of the *plaintiffs* for a longer period. The very object of the bond was to secure his fidelity during all such time as he should be employed. Lord *Arlington v. Merricke* is the only case cited that bears any analogy to this; but that was an appointment by Lord *Arlington* under seal, and was the case of a surety. The recital is only to aid some ambiguity in the condition, but if the condition is clear, there can be no necessity for recurring to the recital to explain it.* In *St. John v. Digges*,† which was debt on obligation 'to pay 10l. for the rent of certain lands,' it was held that these latter words were but recital, and the 10l. was payable at all events. Here the words of the condition are to collect the rents which shall annually grow due; this shews that it was to continue longer than a year."

LORD ELLENBOROUGH, C. J. "Why might not he collect annual rents which might then *annually* become due?"

CLARKE. "The word *successors* would not have been used if it had not been a permanent engagement. This also appears from the latter branch of the condition. "And also, if the said W. A. shall so long as he shall continue to be employed by the said company, from time to time, observe and perform their orders, &c. and it is a general maxim that all words shall be taken most strongly against the grantor, obligor, or person using them."

LORD ELLENBOROUGH, C. J. "It does not follow from the words last referred to, that he is to continue to be employed beyond the year; and you must generate a doubt upon the words before your maxim can apply. This case seems to go upon all fours with Lord *Arlington v. Merricke*, and although it is the case of a

* *Rol.* 247. *Parol*, 388, a. 19. † *Hobart*, 130.

principal, it is in effect also the case of a surety; for both the principal and the surety are bound in the same terms; and we cannot give to the same words in the case of the principal a greater effect than in that of the surety. The recital is of an engagement to be employed for twelve months, and they state that they had required security for the performance of the said office. What is that office? To collect rents for the before-mentioned term, the particulars of which are stated afterwards. Then there are general words—during the continuance of *such* his employment. What employment? Leave out the word *such* and instead of the word of reference insert the words *referred* to, then it will be his employment in the office during twelve months; and though the word *annually* is used, on which a question has been suggested, this does not mean that he will annually account to the company after the time that he is to serve the company. This case runs in terms with Lord *Arlington v. Merricke*.

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JUDGMENT for the DEFENDANT.

LINDO against SIMPSON.—July 3.

After issue, notice of trial, putting off the trial till a subsequent term, and a plea of bankruptcy, puis darrein continuance, the court gave leave to amend that plea without imposing the terms that the plaintiff should be at liberty to discontinue without costs, but imposing terms as to continuing the notice of trial, and taking short notice. Q. How bankruptcy is to be pleaded puis darrein continuance.

THIS was a rule for the *plaintiff* to shew cause why the *defendant* should not be at liberty to amend the pleading by stating the particulars of the bankruptcy in his second plea. The case appeared to be as follows: Issue was joined in *Hilary* term last on the general issue; and notice of trial was given for the sittings after *Hilary* term. Application was then made to put

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off the trial until *Easter* term, on account of the absence of a material witness in the *West Indies*. In the affidavit for this purpose there was no intimation that the *defendant* was delaying the trial in order to obtain his certificate, and the trial was accordingly put off. The commission against the *defendant* issued on the 4th of *December* last; the certificate was signed in *February*, 1805, and allowed on the 28th day of *February*, 1805. The court afterwards admitted the *defendant* to plead this, *puis darrein continuance*. And now the *defendant* was desirous of amending the *plea*, it being in the general form under the statute 5 *Geo. II. c. 30, s. 7*; and it being thought most advisable, on the part of the *defendant*, to insert all the proceedings in the bankruptcy in full, as in a plea of bankruptcy before that statute.

GARROW shewed cause, and contended, at first, that the *defendant* was not entitled to amend; but, upon Lord ELLENBROUGH, C. J. observing that the *defendant* did not want to plead bankruptcy anew, but to plead it correctly, he then requested that the *plaintiff* should have liberty to discontinue his action without costs.

LAWRENCE, J. "You must reply; the plea will not conclude to the country; judgment as in case of a *nonsuit* cannot be obtained for not going to trial; and then, if you do not reply, you may move to stay proceedings. As to discontinuing without costs, there is not enough to shew you to be entitled to that at present.

LE BLANC, J. "You should come with that motion hereafter, next term."

The terms of the present rule were then settled that

* See *Tower v. Cameron*, 6 *East*, 413, and 2 *Smith's Reports*, 439.

if the *plaintiff* should choose to go to trial, the notice of trial should be continued the same as before, and the *defendant* should take short notice of trial.

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The SOLICITOR GENERAL and PEAKE, for the *defendant*, said they had great difficulty as to the propriety of pleading the certificate generally, *puis darrein continuance*, under the stat. 5 Geo. II. c. 30. § 7, and, upon consultation, thought it most advisable to amend the plea.

The COURT intimated no opinion upon this point,* but made the

RULE ABSOLUTE.

CHEAP against POPHAM. Bart.—

June 26.

Semble. A defendant is not entitled to a rule to shew cause why the plaintiff should not give security for costs, until he has applied to the plaintiff's attorney, and he has refused; or at least he is not entitled to make it absolute if the plaintiff's attorney having offered to give such security as the master should require, and to enter into a bond for the purpose, the defendant refuses to accept of this accommodation in order merely to gain time, or defeat the purposes of justice.

THIS was a rule calling upon the *plaintiff*, who resided in ———, and out of England, to give security for the costs. It was admitted, that the *defendant* was entitled to have the rule made absolute in the ordinary course of proceedings; but on the part of the *plaintiff*, it was insisted that it ought not

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* See *Parish v. Salkeld*, 2 Wils. 139, which was a plea after issue joined, and therefore a plea *puis darrein continuance*; and see how far it is overruled by *Willan v. Giordani*, Co. B. Laws, 356, and *Towers v. Cameron* and Another.

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to be made absolute, or else that terms should be imposed of giving judgment of the term, under the following circumstances, which shewed that it was intended merely as a trick to prevent the *plaintiff* from obtaining a judgment of the term.

The action was in debt upon a bond for 9000*l.* with interest from *December*, 1792. Up to and on the 16th of *June*, the *defendant* had not appeared, the proceedings having been instituted in *Easter* term, and the *alias distringas* being returnable on the 17th of *June*. On the 20th of *June* the *defendant* cravedoyer; on the 21st a plea was demanded; and on *Saturday* the 22^d, when the *plaintiff* was entitled to a plea, the *defendant* obtained the above rule which he served on that day or on *Monday* to shew cause on *this day*. *Monday* being a *dies non*, judgment for want of a plea could not be signed, and thus by the present rule being a stay of proceedings during *Tuesday* and to day, the *plaintiff* would be prevented from giving notice of trial at the last sittings within term. In order to prevent this consequence, the *plaintiff's* attorney offered to give security, and also a bond to go before the master, as if the rule were then made absolute; but this not answering the purpose of the *defendant*, was refused; and now,

MARRYAT, for the *defendant*, shewed, that as the *plaintiff* could not have signed judgment, if a plea had been filed early on the *Tuesday* morning, this rule had occasioned no delay; and that the proceedings, were strictly regular in point of form, on the behalf of the *defendant*.

LORD ELLENBOROUGH, C. J. "It does not appear that there could have been a plea before *Tuesday* and the *plaintiff*, has not been prejudiced by the delay; but yet it appears that there has been an intention of obtaining time by artifice. Here the

never was a necessity of applying to the court for this rule ; and I think there ought never to be a rule of this kind obtained, until the attorney on the other side has been applied to, to say whether he will give security without applying to the court."

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LAWRENCE, J. "I would not have it supposed, although the parties proceed with the strictest regularity in form, if it afterwards turns out that the intention of obtaining a rule was by art and ingenuity to do that which is wrong, that such conduct shall pass without censure. There is not a day that passes in which some of the rules of the court are not used for improper purposes. Applications are constantly made for particulars of the *plaintiff's* demand by persons who have better information than the *plaintiff* himself. But wherever I see that any rule, which is intended for the purpose of justice, is applied to the purposes of injustice, I shall as far as in me lies, endeavour to frustrate that intent, and deprive it of its effect, and I shall consider the attorney as guilty of a very serious offence."

RULE DISCHARGED WITH COSTS.

WILLOUGHBY against SWINTON.—June 26.

A bond for payment of money by instalments yearly, with a separate agreement, that the forfeiture of the condition is not to extend to accelerate the payment, is within the statute 8 and 9 W. III. c. 11. s. 8, and the plaintiff having obtained judgment thereon, cannot sue out execution for a subsequent instalment without suing out a scire facias.

THIS was a rule to shew cause why the *fi. fa.* WILLOUGHBY
issued in this cause, and all the proceedings
should not be set aside, and why the sum of 53l.
which had been paid into the hands of the sheriff
of London should not be restored to the *defendant*.
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WILLOUGHBY
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SHERIFF.

The *plaintiff* had entered up judgment on a bond for 1080*l.* conditioned for the payment of 494*l.* 4*s.* 5*d.* by instalments at the rate of 50*l.* *per ann.* Upon which bond there was indorsed, or, after which there was executed the following agreement: "*memorandum*, whereas Mr. D. Swinton has this day given and executed to me one bond or obligation in the penal sum of 1080*l.* conditioned for the payment of 494*l.* 4*s.* 5*d.* by instalments at the rate of 50*l.* *per annum*; now I do hereby declare, that nothing in the said bond or obligation contained shall authorize me to proceed upon any default of payment for any sum which shall not have become actually due at the time, nor tend in any manner to accelerate any of the payments mentioned in the said bond or the condition thereof; witness, &c. this 30th of May, 1801". Upon this bond the *plaintiff* had brought an action, and obtained a judgment, and sued out execution, whereupon the *defendant* paid 75*l.* for the instalments then due, and the *plaintiff* gave a receipt in discharge of the action. He now sued out execution, for instalments since due, without having sued out a *scire facias* and without having assigned a fresh breach.

PARNTHER now shewed cause, and contended that this was merely a bond for the payment of money which was not within the words and meaning of the statute 8 and 9 *W. III.* c. 11. s. 8, and that the cases which had lately been decided with respect to annuity bonds, in which it was held necessary to sue out a *scire facias* for every instalment, were not applicable to the present case. He cited *Darby v. Wilkins*, * *Howell v. Hanforth*†, and also *Tidd's Practice*, second edition, 1073.

* 2 *Strange*, 957.† 2 *Blackstone*, 843.

MARRYAT, *contra*, relied upon the case of *Collins v. Collins*,* and said that the case of *Darby v. Wilkins* was decided, when it was the general opinion that annuity bonds were not within the statute; and he said that there was a great difference between this case and those in which there was a judgment for the whole, and a *cesset executio*.

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LORD ELLENBOROUGH, C. J. "The case of *Collins v. Collins* decided this question, when it decided in the case of an annuity, that there should be no execution for new instalments, without a *scire facias*, although the judgment extends beyond the sum. I see no difference between sums of money payable during the term of a man's life annually, and sums payable for a series of years, each of them reserved by bond. They are expressly within the terms of the statute. The court, having determined the former case, it must follow that it applies to all cases falling within the same principle. There is no difference whether the instalments are limited by the term of existence generally, or by a specific term of years. The practice also has generally been so, and it is very convenient; for if the party has paid a part, he may plead it to the *scire facias*, or if he has paid the whole, he may have the means of preventing injury being done to him by an execution, upon which otherwise he would be left to his action, or to move the court."

GROSS, J. "I was rather inclined to doubt, but I think it is decided by *Collins v. Collins*."

LAWRENCE, J. "Since the case of *Collins v. Collins*, there has been no decision to distinguish this case from it. But I think it is a very severe case upon cre-

* 2 Bur. 824, 826.

1896.

WILLOUGHBY
versus
SWINTON.

ditors where there has been no default : for, to be put to bring as many actions as there are instalments is rather hard upon a plaintiff."

RULE ABSOLUTE, but without costs.

WELCH against IRELAND.—July 1st.

Where there is a bond for performance of articles, the statute of 8 & 9 W. III. c. 3, is compulsory on the plaintiff to assign breaches.

WELCH
versus
IRELAND.

THIS was a rule to shew cause why the defendant should not be discharged out of custody, upon a *ca. sa.* sued out upon a judgment in an action of debt on a bond, which was conditioned for the performance of certain articles of agreement; and upon which the plaintiff had signed final judgment and taken out execution, without having assigned breaches and assessed the damages, under the statute 8 and 9 W. III. c. 3, s. 11.

WOOD, for the plaintiff, shewed cause, and said that the case of *Drage v. Brand*,* which was the first or principal case, in which it was held to be necessary to assign breaches, in such a case, was very incorrectly reported in *Wilson*, and had led to much error in the subsequent decisions. He was in the cause; and he stated the case nearly as it is stated in the report, but added that the plaintiff had assigned two breaches upon the agreement, and notwithstanding took a verdict for 1s. damages only; and that, according to his recollection of the case, the court held, that it was optional upon the plaintiff to assign breaches or not: but that having done so, he must proceed to assess the damages. That the court also took notice of the words of the statute, which are in one part, and as to one subject, optional, but as to the other compulsory; and that the word

"may," is used in the statute. He then proceeded to examine the other subsequent cases, and further suggested some serious inconveniences to the *plaintiff*; such as that in the *northern* counties, as the *damages* could not be assessed before the sheriff, the case must stand for trial at the assizes, and the party be delayed twelve months.

THE COURT said, it might be remedied by laying the *venue* in *London*; and considering the point fully settled, made

THE RULE ABSOLUTE.

LINTHWAITE against BELLINGS.—July 1st.

To entitle the defendant to costs under 43 Geo. III. c. 46, s. 3, there must be an actual recovery by law, and a compromise for less than the sum sworn to will not entitle the defendant to costs.

IN this case the *defendant* had been arrested, and there was a mistake, as it was said, in the accounts between the *plaintiff* and the *defendant*. The *defendant* paid money into court, less than the sum for which he was arrested. The *plaintiff* took this sum out of court, and then the *defendant* obtained a rule to shew cause why the *plaintiff* should not pay costs under the stat. 43 Geo. III. c. 46, s. 3, which enacts that in any action, whereon the *defendant* shall be arrested, and wherein the *plaintiff* or *plaintiffs* shall recover less than the sum sworn to, &c, the *defendant*, shall be entitled to costs.

LINTHWAITE
VERSUS
BELLINGS.

LITLEDALE, for the *plaintiff*, contended, from a passage in the case of *Clarke v. Fisher*,* that this case was not within the statute, there being no recovery; and of this opinion was the court, and therefore dis-

* 1 Smith's Reports, 428.

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LINTHWAITE
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BELLING.

charged the rule; but, as it was a question upon the construction of the statute, they would not discharge it with costs.

HARRISON, W. *contra*.

LITLEDALE then opposed the rule upon the merits, and thereupon the

RULE WAS DISCHARGED with costs.

GREEN against LAW—July 3d.

There is no compulsion upon a defendant to make a set-off, and if he pleases he may bring a cross action; provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court, which will follow, unless good reason can be shown for not pleading such set-off.

GREEN
versus
LAW.

IN this case there were cross demands between the plaintiff and defendant. The plaintiff was indebted to the defendant, in 7l. 3s. 4d. for bread; and the defendant was indebted to the plaintiff, in 3l. 3s. for a chaldron of coals, for which this action was brought. The defendant had, however, previously brought an action for the 7l. 3s. 4d. and upon the plaintiff's then taking out a summons to stay proceedings, upon payment of debt and costs, offered to allow the 3l. 3s. and had always been willing to receive the balance really due. At the judge's chambers, the attorney for LAW, did not know what the counter demand was exactly, or the judge would then have made an order for staying all proceedings, upon payment of the difference: GREEN had just then issued his writ, returnable almost immediately, in order to get the costs of a declaration, and his attorney then wanted to have the costs of the writ paid to him.

LAW, and his attorney, swore, that he had never demanded more than his balance, but could not prove

a tender of the cross-demand until after the writ issued, and when his attorney attended before the judge. *Green's* attorney swore, that he or his clerk who attended the judge did not then know the amount; that he afterwards met *Law's* attorney at the master's office, when *Law's* costs were taxed at $\text{£}1. 3s. 3d.$ and he then offered to take the three guineas, with his costs out of pocket, being at that time $1\text{l. } 4s.$

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GREEN
versus
LAW.

There was, however, no breach of good faith suggested, but merely an adverse litigation about costs, and the right to bring a cross action out of revenge,

READER shewed cause;

ANDREWS was heard *contra*.

THE COURT ordered the affidavits to be read through, and took down the names of the *attornies*, which it would be improper to state here.

THE COURT then agreed that there was no compulsion to plead a set-off, but by inquiring whether there had been any breach of good faith, seemed to me to insinuate that if there had been, they would, at least, have mulcted the offending party in the costs.

LORD ELLENBOROUGH, C. J. "This is a race for costs. The clients on both sides would have settled the whole amicably, perhaps, but for the *attornies*. The law which gives a right to make a set-off, does not compel it. I feel regret, however, that we can do nothing in this case. If I had found that the party, being entitled to the $\text{£}1. 10s.$ had offered to set off the exact amount specifically on the other side, upon being paid the difference, and there had been any promise to pay that difference, we perhaps might have interfered, or it might possibly have amounted to a tender."

LAWRENCE, J. expressed himself in strong terms of disapprobation against both the *attornies*. He said, "This is that sort of conduct which brings discredit

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upon a profession, which, I mean that part of it which belongs to attorneys, if fairly conducted, is as honourable a profession as a man can ordinarily be employed in.

Reader undertook for his client that the costs should be given up.

THE RULE was discharged.

HANSON and another (Assignees of John WALLACE and Another, Bankrupts) against JAMES MEYER.

July 3d.

A. sells all his starch to B., at so much per cwt. by bill at ten months, allowing fourteen days for the delivery, and orders his warehouse-keeper to weigh and deliver all his starch to B. who, in consequence thereof, obtains the delivery of a part, and before the whole is weighed and delivered, becomes bankrupt: Held, that A. may refuse to deliver the residue which is unweighed, the delivery of part not being a constructive delivery of the whole, where any thing remains to be done, as weighing, to ascertain the price.

HANSON
and Another
versus
MEYER.

THIS was an action of *trover*, brought to recover the value of 33cwt. 1q. 21lb. of starch, and was tried before Lord ELLENBOROUGH, C. J. at the sittings at Guildhall, after Trinity term, 1803, when there was a verdict for the *defendant*; and a motion being made for a new trial, which was argued in last *Michaelmas* term, the court, by consent, in *Hilary* term last, ordered: case to be made of the facts that were proved at the trial, which are as follows: The *plaintiffs* are assignees of the estate and effects of John Wallace and William Hawes, under a commission of bankrupt issued against them. The *defendant* is a merchant in London. In the month of January, 1801, the bankrupts employed Mr. Thomas Wright, their broker, to purchase of the *defendant* a quantity of starch, about four tons, belonging to the *defendant*, and which was then lying in the Bull Porters' warehouse in Seething lane: and Wright ac-

Accordingly purchased the starch of the *defendant* at 6l. per cwt. and sent to the bankrupts, his principals, the following note :

"*Dear Sirs,* I have bought small parcel of starch, which you saw, of Mr. *James Meyer*, for your account 6l. per cwt. by bill at two months, 14 days for delivery, from the 14th instant. *January 15th, 1801.*

Your's, &c.

THOMAS WRIGHT."

The starch lay at the *Bull Porters'*; the broker purchased for the bankrupts all *Meyer's* starch that lay there, more or less, whatever it was, at 6l. per cwt. It was in papers; the weight was to be afterwards ascertained, at the price aforesaid. The mode of delivery is as follows; the seller gives the buyer a note, addressed to the warehouse-keeper to weigh and deliver the goods to the *buyer*; this note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the *vendee*. The following note was given to the *defendant*; "*To the Bull Porters, Seething lane: Please to weigh and deliver to Messrs. Wallace and Hawes, all my starch. January 17, 1801. James Meyer and William Elliot.*"— This order was lodged by the bankrupts at the *Bull Porters'* warehouse, on the 21st day of *January, 1801*, on which day the bankrupts required the *Bull Porters* to weigh and deliver to them.

		Cwt.	qr.	lb.
Papers of starch,	540, which weighed	21	1	6
And on the 31st Jan.	250, - - -	9	1	20
And on the 2d Jan.	400, - - -	15	1	4
	<hr/> 1190	<hr/> 46	<hr/> 0	<hr/> 12

At which respective times the *Bull porters*, in consequence of this order, weighed and delivered the same to the bankrupt, who immediately removed the same. The residue thereof being 33cwt. 1qr. 21lb.

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remained at the *Bull Porters'* warehouse till the failure of *Wallace* and *Hawes*. The above quantities of starch continued at the *Bull Porters'* warehouse, in the name and at the expence of the *defendant*, till they were weighed and delivered; and the residue also continued there in like manner unweighed, in his name, and charged to his expence. On the 8th of *February*, 1801, *Wallace* and *Hawes* became bankrupts. It was admitted that the *defendant*, after the bankruptcy, took away the remainder of the starch that had not been weighed. The question for the opinion of the court is, whether the *defendant* is entitled to the above verdict? If the court shall be of opinion that he is so entitled, then the verdict is to stand; if not, then a new trial is to be granted upon such terms as the court shall direct.

HUMPHREYS, for the *plaintiff*, contended that the contract being entire, and not apportionable, as soon as the bankrupt had taken away a part of the starch, the whole became vested in him. That the delivery of a part was a virtual delivery of the whole, and the *defendant* thereby relinquished the right of stopping the delivery of the goods till the payment of the price; *Hammond and others, Assignees, v. Anderson,** and *Fawell v. Heelis and others, Assignees of Fawell.†* And to shew the intirety of the contract, he cited *Bro. Ab. Apportionment*, pl. 7, and *Contract*, pl. 26, 34. He cited also *Hawkins v. Cardy,§* *Dempsey's case,‡* and *Sluby v. Heyward.¶*

* *New Reports*, 69. † *Ambler*, 724.

‡ Lord ELLENBOROUGH, C. J. questioned whether this last placitum was law at the present day, and cited *Balard's* 230, 232.

§ 1 *Lord Raym.* 360.

¶ 4 *Co.* 119. ¶ 2 *H. Bl.* 504.

HOLROYD, *contrd.* " Before a *vendor* parts with his goods he should be paid the whole price of them, or should be enabled to stop them for the price. This is but common justice; and though the property passes to the vendee by delivery of part, yet there not being a delivery of the whole, there still remains a right to stop the rest. 'As soon as the bargain is struck, the property of the goods is transferred to the *vendee*, and that of the price to the *vendor*; but the vendee cannot take the goods until he tenders the price agreed on.'* *Knight v. Hopper*.† Here no property could pass until the goods were weighed, and trover would not lie for the goods: but though even trover would lie, yet, if the vendee had brought an action against the vendor for non-delivery of the goods, he must have averred that he either paid the price or was willing to do so, and must have averred notice thereof, and this does not depend on whether the contract is entire or not. [Here he cited 6 *Modern*, 182, upon which LAWRENCE, J. observed, that it makes a great difference whether the *defendant* bought the six tubs or sold them, and in *Salkeld*, the same case is stated differently; and it does not appear whether the action was for the non-delivery, or for the price of the goods, but from the reasoning of Lord *Hale*, it must have been for the non-delivery.] He then cited also *Dyer*, 29, b. and contended that *Sluby v. Heyward* was a case of stoppage *in transitu*, whereas this was a case of sale, in which there was no *transitus*. The note was not delivered to the vendee, but to the *Bull porters*.

Lord ELLENBOROUGH, C. J. " Was there any other

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* 2 Bl. Com. 448. He cites *Sternhook de Goth.* c. 20, c. 5, 647.

† 12 Mod. 344. See also *Anon. Bull. N.P.* 50. *Salkeld*, 112.

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reason for delaying the delivery until the weighing than for the purpose of ascertaining the price of the whole, which was estimated at so much per hundred weight."

LAWRENCE, J. "You contend that, there being no sale until the weighing, and the *defendant* having ordered the *Bull porters*, who are his servants, to weigh, and they having weighed only a part, he had a right to stop the delivery of the rest."

HOLROYD then said, that from *Hodgson v. Lloy*,* it appeared that the *defendant* had a right to stop, and that in *Feize v. Wray*,† the buyer had given bills of exchange. He therefore contended that the *defendant* was entitled to retain his verdict.

HUMPHREYS, *in reply*. "In *Hodgson v. Lloy* it was part of the contract that the money should be paid immediately, and the goods had not arrived at their ultimate place of destination. The case of *Hammond v. Anderson* proceeds entirely upon the ground that it was an entire contract, and that there was a delivery of a part of the goods."

LAWRENCE, J. "Is it certain that he could not countermand the order for weighing and delivering the goods? As there was no new consideration for it, I do not see but that having dispensed with the bill, being given only as to part of the starch, the vendor might not say that he would not dispense with it, as to the rest, and determine to deliver no more."

HOLROYD now observed, in answer to a question from LAWRENCE, J. *ut supra*, that it appears from the case in 6 *Modern*, that the *defendant* was the vendor; for there are two counts, one upon the agreement and the other for the 50l. earnest.

Cur. adv. vult.

* 7 *Term Rep.* 445.

+ 3 *East*, 93.

And now in this term the judgment of the court was delivered to the following effect by

Lord ELLENBOROUGH, C. J. after briefly stating the case. " By the terms of agreement entered into by the broker on behalf of both parties, two things necessarily preceded the absolute vesting in the *plaintiffs* of any right to recover the goods. *First*, payment upon the delivery, there being by the general rule of law a right, on the part of the *vendor*, to the consideration of the sale, and secondly, the act of weighing. This last is by the particular agreement of the parties; by which the goods are agreed to be paid for by the weight: and as that must be ascertained in order to have it known how much is to be paid for the goods, and what is to be the amount of the bill, weighing necessarily precedes the delivery. In this case the weighing that did take place was only of a part, the remainder continued unweighed and undelivered, and by the words of the case, no bill at two months had yet been given. But on the part of the *plaintiffs*, it is contended that the weighing and delivery of a part is a virtual delivery of the whole, although the price is not paid. This is founded on many legal authorities, which decide that to be the legal effect of such partial delivery, where the payment of the price is the only act necessary to be done to entitle the party to the delivery of the goods. But in this case, there is another act which necessarily precedes the delivery, namely, the weighing. Now this preliminary act it was never in the contemplation of the seller to waive in respect of any order to his agents the *Bull porters*, whereby they are ordered to *weigh* and *deliver* all his starch. As then they, as his agents, were not authorized to deliver the starch without weighing, still less were the *plaintiffs* authorized to take it as their own; and as they, or rather the bankrupt, could not take it, they could not bring the present action of *trover* for it. In other words, as the action of

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trozer is founded on a right of property, while any thing remains to be done to the commodity, the complete right of property does not attach. The action failing on this ground, it is not necessary to consider what is the effect of the non-payment of the price.—The case of *Hammond and others, assignees of Gadsden v Anderson*, has been cited as governing this case; but there the goods were sold for a certain price, and the weighing of the whole quantity, which took place there, was merely for the buyer's own satisfaction, and formed no ingredient in the contract, though it was an important circumstance to shew the actual possession taken of the goods. In like manner, in the case of *Sluby v. Heyward*, 3 H. Bl. 504, one sold 7061 bushels of corn to be paid for at a future day, and the vendee, having the bills of lading, sold the corn to Messrs. *Scott*, who received 800 bushels part thereof, by their agents taking the same out of the ship. His lordship therefore concluded that upon this ground, namely, that the weighing, which ought necessarily to have preceded the delivery of the goods, in order to ascertain the price, had not taken place in this case, the verdict might stand.

POSTEA to the PLANTIFF.

DOE on the demise of LEPPINGWELL against WEAKE.

July 3.

When the conduct of a pauper plaintiff has been vexatious, as by giving notice of trial, and withdrawing the record at the third day of the assizes, and where it is sworn that the merits are with the defendant, the court will order the plaintiff to be dispaupered. But where the defendant has, since the vexatious conduct of the plaintiff, taken steps in the cause which acknowledge his character of pauper, the defendant waives the right to dispauper him.

DON dem.
LEPPINGWELL
versus
WEAKE.

ANDREWS on a former day in this term obtained a rule to shew cause why the lessor of the plaintiff

should not be dispaupered for vexation. It appeared that notice of trial had been given for the *Summer* assizes 1804, and countermanded six days before the assizes; that notice of trial was again given for the last *spring* assizes, and the cause entered for trial; but that on the third day of the assizes the record was withdrawn; that the *defendant* had incurred above 100*l.* costs in procuring evidence, and his attorney swore to merits. It further appeared that in *Easter* term last, the *defendant* had moved for judgment, as in case of a *nonsuit*, for not proceeding to trial; and that upon the lessor of the *plaintiff* undertaking peremptorily to try at the next *Summer* assizes, that rule had been discharged.

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Dox dem.
LEPPINGWELL
versus
WEAVER.

LAWES, for the lessor of the *plaintiff*, now insisted, that he being under a peremptory undertaking to go to trial, and the *defendants* having accepted such undertaking, had thereby recognized his character of pauper, and could not therefore have this rule made absolute: and the court being of this opinion,

DISCHARGED THE RULE.

In the Common Pleas at Nisi Prius, at Westminster, before MANSFIELD, C. J.

GIBSON against WELLS. June 3*d.*

Semble, case will not lie upon an implied condition by a tenant at will to do tenantable repair or reasonable repair, so as to subject him to an action for permissive waste. There must be an express covenant or an assumpsit to render him liable.

GIBSON
versus
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THIS was an action upon the case in which the *plaintiff* declared "that whereas the said *defendant*, on, &c. at, &c. and from thence continually hitherto held and enjoyed, for a certain term, which is not yet determined, a messuage, lying and being,

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&c. as tenant thereof to the said *plaintiff*, and whereof the said *plaintiff* is still seised in fee, of and in the said messuage; yet the said *defendant* well knowing the *premises*, &c. contriving, &c. on the day last aforesaid, and on divers other days and times, &c. injuriously, and without the consent of the *plaintiff*, broke through and broke down divers, to wit, twenty perches of a certain wall, then and there belonging to the said messuage, and so stated *actual waste*, in many particulars. There was also a second count, that the *defendant* held of the *plaintiff* upon and under the condition following, that is to say, that he would not during the said tenancy permit or suffer the said messuage or dwelling-house to be out of tenantable repair for want of the needful and necessary repair thereof. and whereas the said *plaintiff* during all that time was tenant thereof in fee, yet the said *defendant*, on, &c. and at divers other times, suffered and permitted the said last mentioned messuage to be out of *tenantable* repair, for want of necessary repair thereof in the roofing, tiling, and rafters thereof, and in the cieling, floors, and wainscoting thereof, and in the timbers, beams, and joists thereof, and in the doors, windows, window frames, and window shutters thereof, and in the walls and brick work. There was also a third count, that he held upon and amongst other conditions the following, that is to say, that he should not during the said tenancy wilfully permit or suffer the said premises to be out of tenantable repair for want of such repairs as a tenant from year to year ordinarily ought to do with a *breach*, that he permitted it to be out of repair for want of such repair as aforesaid, in the roofing, &c. as before. There was also a fourth count, that he held on the condition, amongst others, that he should not during the said tenancy permit or suffer the said last mentioned messuage to be out of repair for want of proper tiling in the roof thereof, or proper

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glass in the windows. And lastly, a fifth count, that he held upon condition that he would not wilfully misuse the said premises, or neglect any repair he ought to do thereto, so as to prejudice the reversionary interest of the *plaintiff*, and alleged a breach therein in not repairing certain tiling and water-pipes, &c.

The *defendant* became tenant at will to the *plaintiff* in 1795 and was so still. No evidence was given of any special agreement. Some glass windows were broken, some tiling was out of repair, and a large hole had been broken in a wall by some brewer's men in removing a butt of beer out of the cellar, which was not repaired. The windows had been lately repaired, since the action. A few pounds expense would repair the roof, and the hole in the wall, which was said to be wilful waste, might also be repaired for a small sum.

On the part of the *plaintiff* a surveyor was called, and was asked "what tenants are used to do by way of repair, where there is no agreement." But MANSFIELD, C. J. thought the question inadmissible.

SHEPHERD, *Serjeant*, BAYLEY *Serjeant*, and MORRIS, for the *plaintiff*, cited 2 *Esp. Rep.* 590, to shew that a tenant from year to year is bound to do fair and tenantable repair, so as to prevent waste and decay of the premises, though not to do substantial and lasting repairs; and contended, that upon this principle, the present action, founded upon the breach of an implied condition, might well lie, and that there was evidence to support some of the counts, as for wilful waste.

LENS, *Serjeant*, *contrd.*

MANSFIELD, C. J. "This is an action for permissive waste, which is not at all necessary, because if a tenant comes in upon a covenant to repair, there is an adequate remedy; and, if he is only a tenant at will, he cannot do much damage by permissive waste, because the landlord

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can turn him out of possession, upon six months notice.* The declaration in every count but the first states an express condition, which is not proved; or if it be presumed to be an inference of law, the jury must understand that there is no such law. That which the law imposes on all mankind cannot properly be said to be a condition of a lease. It is also stated to be to the injury of the reversioner, but even the crack in the wall which was done, not wilfully, but by accident, is not an injury to the reversion, because it may be repaired before the expiration of the lease, and there is really no way of assessing the damages. Tenantable repair is what one hears of every day, but one knows not what it is, unless it is explained by a covenant or an express *assumpsit*. Every want of repair in every house in the kingdom may be said to have arisen from the neglect of the tenant, who might have repaired, at a great expense. The rule laid down in *2 Espinasse*, 590, is to be found in no other book; the action must have been in *assumpsit*."

Whereupon the *plaintiff* was nonsuited.

He moved for a new trial, as I understood, and with great difficulty obtained a rule to shew cause, but afterwards abandoned it.

* With respect to permissive waste, no remedy lies against a tenant at will; for he is not bound to repair or sustain houses like tenant for years. 3 Rep. 13, b. 1 Show. 288.

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ACTION UPON THE CASE.

definite use of the water by the first settler, the latter is entitled to enjoy as much as he can so occupy in a similarly definite manner; and though the prior settler might have previously used all the water, he cannot then abridge the use of the second settler and occupant. *Bealey v. Shaw, H.* 45 Geo. III. 321

2. An action for criminal conversation with the wife of the plaintiff is an action upon the case, and the proper plea is not guilty within six years. *M'Fadden v. Ollivant, E.* 45 Geo. III. 468

3. Though it may be the duty of all persons to give information to his majesty's proper officers concerning abuses, yet if one write to another in a letter to such officer, that he is doing something to the prejudice of his majesty's service, which is not true, this is sufficient evidence of a malicious intention; and where no excuse is set up by the defendant, the jury may well find him guilty, though there be no other publication and no further proof of malice. What is a malicious publication, it is for the jury to determine. *Robinson v. May, M.* 45 Geo. III. 3

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6. A corporation being entitled by prescription to toll on all wheat brought into the market, and there sold on a market-day, but in which of late it had become the practice to sell by sample, and upon which sale by sample they had claimed the like toll for corn sold in the market; held, that where *A.* bought of *B.* in the market by sample to be delivered in the Borough, *A.* knowing *B.* not to be a freeman exempt from the toll, and the corn not to have been in the market, and the toll not to have been paid, and which corn was the next day delivered, the corporation could not maintain case against *A.* for such sale in fraud of the toll. *Q.* whether it would lie against *B.*? Held also, that such sale by sample is not evidence of a sale by bulk, upon a count for purchasing corn in the market in bulk, and not paying the toll. *The Bailiff, &c. of Tewkesbury v. Diston, E. 45 Geo. III.* 508

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ADMINISTRATOR.

1. See PLEADING, No. 11, and *Cowell and Wife v. Watts, H.* 411
2. See PRACTICE, No. 19.

ADMISSION.

See EJECTMENT, No. 3.

ADULTERY.

See BARON AND FEME, No. 2; and *Chambers v. Caulfield, H.* 356

AFFIDAVIT.

1. See LORDS' ACT, No. 3.
2. See PLEADING, No. 10.

AFFIDAVIT OF MERITS.

1. See PRACTICE, 2.
2. ————— No. 10.
3. ————— No. 23.

AFFIDAVIT OF DEBT.

1. See PRACTICE, No. 13, and *Wood v. Jenkins, M.* 157
2. See PRACTICE, No. 34, and *Anonymous, M.* 207

AGREEMENT.

1. See PLEADING, 2; and *Hunt v. Silk, M.* 15
2. Agreement "to let to *A.* a house, at a yearly rent, to continue during the life of the lessor, supposing it to be occupied by the lessee himself, or a tenant agreeable to the lessor;" held, that no interest passes, under a lease to be made under this agreement, to the executors, but it must be a lease for the life of the lessor, if the lessee occupies himself, or by a tenant agreeable to the lessee; and that upon his death the lessor may eject the executor without a notice to quit. *Doe dem. Bromfield v. Smith, T. 45 Geo. III.* 570

ALIENATION, RESTRAINT OF.

See DEVISE.

AMENDMENT:

1. See PRACTICE, No. 18.
2. See PRACTICE, No. 23; and *Rutherford v. Mein, and Others, H.* 392

ANNUITY.

1. One may agree not to insist upon a *scire facias*, to revive a judgment against him after the year has elapsed; and execution sued out without a *scire facias* will then be good. Where one gives a counter-security to another, containing a covenant to pay an annuity and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed, that, in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specifically, being the price of the annuity, it is not necessary to

assign breaches under the statute 8 and 9 W. III. c. 11, s. 8; but execution may issue for the whole sum. *Howell and Another v. Stratton and Another*, M. 45 Geo. III. 66

2. Where a judgment entered up to secure an annuity was set aside, the party brought assumpsit for money had and received, and produced the annuity-deed as evidence of the consideration; held, that, although this deed, upon the face of it, does not appear to be void, yet upon proving the rule to set aside the judgment, and to deliver up the warrant of attorney to be cancelled, the plaintiff might recover, because one of the securities failing upon which the annuity was granted, the whole fails, and the consideration money becomes money had and received to the use of the plaintiff. *Scurfield v. Gowland*, H. 45 Geo. III. 332

APPEAL.

1. Where upon a conviction on the stat. 29 Geo. II. c. 33, s. 7, an appeal is allowed to the sessions, upon giving eight days notice, held, that it is only necessary to give notice to the prosecutor, &c. and not to the overseers of the parish, although part of the penalty is given to the poor of the parish. *Anonymous*.—Conviction, H. 45 Geo. III. 241

2. No appeal lies to the sessions from a conviction by two justices for an offence under 42 Geo. III. c. 38, s. 30; notwithstanding the act contains a general clause of reference to all former excise laws, and incorporates all the powers and provisions of 12 Car. II. c. 24, and of all other laws relating to the excise or inland duties, under the management of the commissioners of excise for the managing, raising, mitigating, and levying the duties by the said act 42 Geo. III. c. 38. *The King v. Skone*, T. 45 Geo. III. 643

APPOINTMENT.

1. Where *A.* was seised in fee, and conveyed to *B.* and his heirs to the use of such persons and for such estates as he *A.* should appoint by deed or will, remainder to the use of *A.* and his heirs; and afterwards granted a rent-charge, with a covenant for him and his assigns to pay the same; and then *A.* and *B.* by lease and release, &c. release, and also appoint to *C.* the premises subject to the rent-charge, and *C.* enters into a covenant with *A.* to pay the same rent-charge: held, that *C.* is not liable personally to an action of covenant, at the suit of the grantee of the rent-charge as assignee, the conveyance operating under the power and not out of the estate of *A.* *Roach and Another v. Wadham*, H. 45 Geo. III. 376

ARBITRATION.

1. See VERDICT, No. 1; and *Bonner v. Charlton*, M. 8
2. See PLEADING, No. 14. *Elson and Another v. Rolfe*, E. 459

ARTICLES OF UNION.

See PLEADING, No. 20.

ARREST.

See PRACTICE, No. 6.

ASSAULT.

See PLEADING, No. 14.

ASSIGNEE.

See APPOINTMENT, No. 1.

ASSIGNMENT.

See AGREEMENT, No. 2.

ASSIGNMENT, FRAUDULENT.

See BANKRUPT, No. 2.

ASSUMPSIT.

1. In assumpsit, the plaintiff declared, that in consideration that he would permit the defendant to occupy a house for four

weeks, at ten guineas per week, the defendant undertook to pay "the said rent," and the plaintiff recovered, though the defendant never took possession, and, though no other promise was proved, than that the defendant said she would take the house upon the terms. The said rent, in such a declaration, means the said sum in gross. The letting and hiring is evidence of an express promise sufficiently to enable the party to bring assumpsit. *Gregory v. Badcock*, *M* 45 Geo. III. 18

2. *A.* and *B.* interchangeably accept accommodation-bills; *B.*'s bills are discounted with *C.* who, upon their becoming due, agrees to renew them; but *A.* having fallen into discredit, *C.* does not take his name to the bills, but draws for the amount on *B.* only; before these new bills become due, *A.* becomes bankrupt: *Seemle*, *B.* might have proved under *A.*'s commission, for the former accommodation-bills, this being a payment as it were of those bills. *B.* having arrested *A.* for the amount of the bills paid to *C.* after *A.* obtained his certificate, the court discharged *A.* upon filing common bail. *Franco v. Dubois*, *M* 46 Geo. III. 36

8. Where a declaration stated an undertaking to carry safely certain goods by water, with an exception of all accidents arising from the act of God, the king's enemies, fire, pirates, and all other dangers and accidents of the seas, rivers, and navigation of what nature or kind soever, held, that this exception, being beyond the common law exception, must be specially proved. *Richardson v. Sewell*, *H* 45 Geo. III. 205

4. In assumpsit for a fine on admission to a copyhold, where the lord remitted a part of the fine, held, that it was not necessary to prove an entry on the court-rolls, either of the original assessment of the fine, or the re-assessment; for the lord, and not the homage, is to assess the fine.

Northwick v. Stanton, *H* 45 Geo. III. 225

5. In assumpsit on the warranty of a horse, where the warranty was "sound in the eye, &c. except a slight snap, which will be well in a few days;" held that the exception was material, and should be stated in the declaration, although, if the exception had not been made, it might not have been an unsoundness under the general warranty. *Morris v. Lithgoe*, *E* 45 Geo. III. 395

6. If an auctioneer places a ticket of a bidding under a candlestick for the vendor, it is not sufficient to avoid the duty, in case there is no sale to a *bona fide* purchaser. And where one said to the vendor that he had done all to avoid the duty, and upon this, was called upon to pay, held, that he could not recover against the vendor for the duty paid. *Capp v. Topham*, *E* 45 Geo. III. 443

7. See PLEADING, No. 12, and *Martin and Others v. Smith*, *E* 543

ATTACHMENT.

2. See COSTS, No. 2. AWARD; No. 1. and *Stokes v. Lewis*, *M* 12

2. See PRACTICE, No. 21; and *Knyon v. Grayson*, *M* 61

3. See PRACTICE, No. 17; and *The King v. the late Sheriff of Middlesex*, *H* 245

4. See AWARD, No. 3; and *H. n. free v. Bromley and Others*, *H* 400

ATTORNEY,

1. See PRACTICE, No. 30; and *Cocks v. Harman*, *E* 409

2. Applications, upon special circumstances, to be admitted an attorney, must be made by petition to the judges, at the treasury chamber, and not by motion to the court. But under statute 37 Geo. III. c. 90, § 31, where an attorney has discontinued practice, and is therefore struck off the rolls, for not paying the certificate duty, he must apply by motion to the court, and state, upon affidavit, how he has

employed his time during the interval of his suspension from practice. In all such cases, the court will impose some penalty. *Ex parte W. Saunders, M. 45 Geo. III.*

rial part, by the party. *Henfree v. Bramly and Others, E. 45 Geo. III.*

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BAIL.

3. Where an attorney had wholly prepared and signed a bond to pay money to his client, upon a wrong stamp, he was compelled upon motion to put a proper stamp upon it; but, though the only subscribing witness was his own servant at the time of the execution, the court refused to compel him to admit the execution of the bond, he swearing that he did not then know where such witness resided. *Guilliam v. Barnett, M. 45 Geo. III.*

154

1. See *SCIRE FACIAS*, No. 1. and *Coxeter and Another v. Burke, M.*

14

2. See *PRACTICE*, No. 8. and *Ward v. Lowring, M.*

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3. An undertaking given by an attorney to a sheriff's officer, to appear and put in bail, is void; even though given before an arrest has been made, and when it was not in the power of the officer to execute the writ. *Parker v. England, M. 45 Geo. III.*

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4. *Seemle*, Where the bail are let in upon terms to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security; the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail was first let in to try upon terms. *Goss v. Harrison, H. 45 Geo. III.*

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5. The bail in *B. R.* are only liable jointly or severally to the amount of the sum sworn to in the affidavit, to hold to bail, and the costs. *Jacob v. Bowen, E. 45 Geo. III.*

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ATTORNEY, POWER OF:
See *BILL of Exchange*, No. 2.
M.

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AUCTION DUTY.

If an auctioneer places a ticket of a bidding under a candlestick for the vendor, it is not sufficient to avoid the duty, in case there is no sale to a *bona fide* purchaser. And where one said to the vendor that he had done all to avoid the duty, and upon this was called upon to pay, held, that he could not recover against the vendor for the duty paid. *Capp v. Topham, E. 45 Geo. III.*

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AWARD.

1. See *COSTS*, and *Stokes v. Lewis, M.*

12

2. See *COSTS*, No. 3; and *Ward v. Mallender, M.*

64

3. An arbitrator under the general terms, impowered to make his award, so that the same may be made and published, on or before a certain day is *functus officio*, when he has once made his award, and cannot alter the same. But if he do alter it, the award is still good for the original sum awarded, for he is then a mere stranger to the award; and it is not like the alteration of a deed in a mate-

See *PRACTICE*, No. 20.

6. Where the plaintiff has taken an assignment of, and instituted proceedings on the bail-bond, he is prevented from proceeding in the original action. If, therefore, the bail being fixed, and such proceedings being had, the defendant upon having put in bail above, applies to stay proceedings upon the bail-bond on payment of costs, and before the expiration of the rule nisi, the plaintiff has lost a trial, he is entitled to have the bail-bond stand as a security; for the rule nisi is a further stay of proceedings, and the loss of a trial was not occa-

sioned by his laches, *Eyton v. Beattie*, E. 45 Geo. III. 489

See PRACTICE, No. 33.

7. In a cause removed by *Ha. Cor.* from the mayor's court, bail having been put in, the plaintiff served a rule for better bail, wrongly entitled *A. v. B.* instead of *A. v. B. and C.* The defendant thereupon gave notice of justification of the same bail, and afterwards that he should add one and justify; held, this was a waiver of the irregularity, for it is not usual to give notice of justification without an exception, though it may be done, and therefore, the notice of justification refers to and adopts the rule for better bail. *Aldridge v. Schrader and Tomkins*, M. 45 Geo. III. 75

See ANONYMOUS.

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BAIL-BOND.

See PRACTICE, No. 2.

BAIL, COMMON, see COMMON BAIL.

BANKRUPTCY.

1. Where a bankrupt brought trespass against the messenger to the commission, in which action he was non-suited, without the validity of the commission being fully tried, and afterwards brought trover against the assignees to try the same question; held, that he should not be put to give security for costs. *Semble*, *aliter*, if the question had been once fully tried. *Kennet v. Duff*, E. 45 Geo. III. 423

2. A docket being struck against *A.* one *B.* agreed with *C.* and several of the creditors by parol, to pay 10s. in the pound out of his own monies, they assigning the debts to him; and a deed to that purpose was agreed to be made, and *C.* authorised *D.* by parol, to sign it for him: the rest of the creditors signed; *C.* afterwards refused; and brought assumpsit against *A.* for his whole debt, who pleaded the

general issue, and accord and tender of satisfaction, as above; and a verdict was obtained for the defendant; *B.* assenting that it should stand, the court refused to set aside this verdict, though on all the special pleas, *C.* was entitled to a verdict. Held, that this being a purchase of the debts, was not within the statute of frauds, and *C.* could not recover in his own right, but only for *B.* *Anstey v. Marden*, M. 45 Geo. III. 426

3. The bankrupt himself cannot, in trover, against his assignees, set up an act of bankruptcy previous to the petitioning creditor's debt, in order to defeat the commission. *Quare*, Whether in any case it can be done to defeat a commission, unless a commission is sued out upon such prior act of bankruptcy? *Kennet v. Duff*, E. 45 Geo. III. 442

4. *A.* a bankrupt, by *B.* his agent, purchases corn abroad, and assigns to such agent a credit on *C.* a merchant abroad, and also on *D.* a merchant in *London*, allowing *B.* a commission. *C.* shipped corn for *A.* and took bills on *A. B.* and *D.* severally, for aliquot parts of the amount, according to the order of *A.*; and also shipped other corn, and drew other bills, and sent the documents to *B.* In the bills of lading *C.* appeared to be the shipper, *B.* transmitted these bills of lading unindorsed to *A.* and debited him with the amount of the bills drawn. The bills drawn by *C.* were dishonoured. *A.* committed an act of bankruptcy, and then received the bills of lading, &c. and agreed to give up the corn, &c. to *E.* the general agent of *B.* in *London*. Held, that *E.* could not retain it as against the assignees of *A.* *Siffken v. Wray*, E. 45 Geo. III. 480

5. See PRACTICE, No. 37, and *Lindo v. Simpson*, T. 659

BANKRUPTCY, PLEA OF.

1. See PLEADINGS, No. 13, and

Tower v. Cameron and Another, E.

439

2. See *Lindo v. Simpson, T.* 659

BARON AND FEME.

1. See *INSURANCE of LIFE*, No. 1.

2. Where a husband and wife entered into a deed with a provision that in a certain event, and upon the consent of the trustees, the wife should be permitted to live separate, and she did live separate from her husband, but without the consent of the trustees, and then committed adultery; held, that the husband might bring an action for criminal conversation against the adulterer; notwithstanding the authority of *Weedon v. Timbrel*, 5 Term. Rep. 357. Query, How far upon principle that case is law? *Chambers v. Caulfield, H.* 45 Geo. III. 356

BASTARD.

See *POOR*, No. 1; and *Cole v. Gower, M.* 246

BILL OF EXCHANGE.

1. In a declaration, by the indorsee against the acceptor, on a bill of exchange, it is not necessary to aver that the acceptor had notice of the indorsement.

Semble. In an action upon a bill of exchange, with money counts also, where the plaintiff has judgment in demurrer, upon the count on the bill of exchange, he cannot obtain a rule to compute principal, interest, and costs, without first entering a *nolle prosequi* on the money counts. How he must proceed in vacation upon a summons before a judge for that purpose, see the note to this case, *Heald v. Johnson, M.* 45 Geo. III. 44

2. Where one gives a power of attorney to another, to demand and receive all monies due to him on any account whatsoever; and to use all means for the recovery thereof, and to appoint attorneys for the purpose of bringing actions,

and to revoke the same, "and to do all other business," the latter words must be understood with reference to the former, as meaning all business appertaining thereto, and although the attorney may receive monies due in *auter droit* to the principal, yet he cannot indorse a bill for him, which comes to his hands under the power. *Hay and Another v. Goldsmid and Another, M.* 45 Geo. III. 80

3. *A.* in *America*, drew bills of exchange on *B.* in *London*, which, upon being presented for acceptance, *B.* refused to accept, and some were protested. Immediately afterwards, *B.* wrote to *A.* noticing this protest, and said, "our prospect of security on the *Chesapeake* is so much improved, that we shall accept or certainly pay all the bills which have hitherto appeared:" held, this was an acceptance, notwithstanding the letter did not reach *A.* till after the bills were due, and could neither induce credit, nor have been communicated to third persons after the bills became due. *Wynne and Scholey v. Raikes and Others, M.* 45 Geo. III. 98

4. Where a bill is returned for non-payment to a party residing in the country, and the post goes out so soon on that day as to render it impossible or very inconvenient to give notice to the drawer by the next post, on the same day, it may be an excuse for not sending notice to him by that post; but it must at any rate be sent by the next following post, and it will not be good if sent by a private hand on the next day, and it does not arrive till after the post. Whether reasonable notice or not, is a question of law upon which the jury are to determine under the direction of the judge. "The next post" means the next convenient post. *Darbyshire and Another v. Parker, M.* 45 Geo. III. 196

5. A bill drawn on *Leghorn* was not presented in due time, owing

to the political state of the country at that time, which rendered it impossible to present it; held, that it being afterwards presented for payment with due diligence, and refused for want of presentation at the time when it was due, the holder might recover against the antecedent parties; and evidence of the impossibility of presenting at the time of the maturity of the bill might be given, on the ordinary averment that it was duly presented. *Patience v. Townley*, H. 45 Geo. III. 224

6. Query, Whether when a bill is left for acceptance, and the drawee, after its remaining in his possession 24 hours, requires time to consider of it, and the holder grants him that time, the holder is not bound to give immediate notice to his indorser of the particular circumstance of such request and of the delay granted; although he is not bound to present the bill for acceptance. *Ingram v. Forster*, H. 45 Geo. III. 243

7. Where on a bill being presented for acceptance, the drawee wrote an acceptance, but before it was called for, obliterated it; and the holder caused it to be noted for non-acceptance: held, that he could not maintain an action upon it as for an acceptance, whatever might be the case as between the drawee and other parties, who were not bound by the act of noting. *Bentinck v. Doriens and Another*, H. 45 Geo. III. 337

8. Where it is necessary or more convenient for the indorsee to send notice, by other conveyance than the post, to the indorser or drawer, of the non-payment of a bill of exchange, he is entitled to do so, and charge for the same; *semble*, the jury will judge of the propriety of the charge and of the quantum. *Pearson v. Cranlan*, E. 45 Geo. III. 404

9. A. declares against B. the acceptor, on a bill of exchange, stating that B. upon sight thereof, accepted it, but does not state a

delivery of it by the acceptor or accepted to the drawer or indorsee: held, upon a special demurrer, that the acceptor is liable by the acceptance, whether he delivers it over or not, and therefore the plaintiff had judgment. *Smith v. M'Clure*, M. 45 Geo. III. 43

BEDFORD LEVEL.

See ELECTION, No. 2.

BILL OF SALE.

See REGISTRY, No. 1, and *Moss and Others v. Mills and Others*, M. 45 Geo. III. 227

BRIDGE.

See TRESPASS *de BONIS AS-PORTATIS*, and *Harrison v. Parker and Another*, H. 45 Geo. III. 262

CANCELLING DEEDS.

See DEVISE, No. 3.

CAPTURE AND MAN, LICENSE TO. See INSURANCE, No. 1.

CASES DENIED TO BE LAW.

See PLEADING, No. 13.

CERTIORARI.

See PRACTICE ON THE CROWN SIDE, No. 1. and *The King v. Binkes*, H. 45 Geo. III. 620

CHANGING OF VENUE.

1. See PRACTICE, No. 13.
2. *Ibid.* No. 32.

CHAPEL.

See MANDAMUS, No. 2.

CHALLENGE TO FIGHT.

See INDICTMENT, No. 5, and *The King v. Phillips*, E. 551

CHARITABLE USES.

See DEVISE, No. 5. and *Doe dem. Toone and Another v. Copestake and Bennett*, E. 45 Geo. III. 496

CHEAT.

See INFORMATION, No. 1. and *The King v. Southerton*, H. 305

COMMON.

See POOR-RATE, No. 1. and
The King v. Watson, M. 145

COMMON BAIL.

See PRACTICE, No. 27, and
Prichmore v. Bradley, H. 405

COMMON CARRIER.

1. *A.* delivered goods to *B.* a common-carrier, to be carried by the mail; he sent it by another coach, and it was lost; *A.* brought an action upon the case, with a count also in trover: held that *B.* having given notice that he would not be accountable for goods above the value of 5*l.* lost or damaged, unless insured at the time, of which notice *A.* was cognizant, *A.* could not recover any thing for the loss. Held, clearly, such a notice is not against the law. *Q.* however, can the party oblige the carrier to take the goods on other terms, by refusing at the time to be bound by the notice. *Nicholson and Another v. Willan and Another, M.* 45 Geo. III. 107

2. See ASSUMPSIT, and *Richardson v. Sewell, M.* 205

3. See PLEADING, No. 22, and *Clark v. Gray, T.* 623

4. *Semble.* Carriers have not at common law a general lien for a balance.

Where evidence of usage is given to shew the existence of such a lien, it must be left to the jury as evidence of mere usage of trade, not of general custom or common law, which indeed requires no evidence to prove it; but as importing an agreement between the contracting parties, in the ordinary course of trade. *Rushforth and Others v. Hadfield and Others, T.* 45 Geo. III. 634

COMMON, TENANT IN.

See TENANT IN COMMON.

1. One coheirress tenant in common may bring an ejectment for

her share without the rest. See DEVISE, No. 4.

2. See COPYHOLD, No. 5.

CONSTABLE.

See NOTICE, No. 1.

CONTEMPT.

See PRACTICE, No. 28, p. 66.

CONVICTION.

1. See APPEAL, No. 1, and ANONYMOUS, *Conviction, M.* 241

2. See MANDAMUS, No. 4. and *The King v. Robinson, H.* 274

3. A conviction on the 39 and 40 Geo. III. c. 106, for entering into an agreement to controul a master manufacturer, held bad, because it neither stated the words and terms of the agreement nor pursued strictly the words of the act, but stated an agreement for the purpose of controuling *A. B. &c. The King v. Nield and Others, E.* 45 Geo. III. 418.

COPYHOLD.

1. See MANDAMUS, No. 3, and *The King v. The Lord of the Manor of Water Eaton, M.* 54

2. See EJECTMENT, No. 3, and *Doe dem. Whitbread v. Jenney, M.* 116

3. See ASSUMPSIT, No. 4, and *Northwick v. Stanton, H.* 225

4. See MANDAMUS, No. 5, and *The King v. Coggan, H.* 417

5. Where there is a custom in a manor for the payment of a separate set of fees to the steward, upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; two sets of fees become due, and continue payable, although the land is afterwards conveyed to one person, as in the case of indivisible services, *Attree v. Scutt, E.* 45 Geo. III. 449

CORN BOUNTY.

1. By stat. 44 Geo. III. cap. 10.

fee, &c. and, at the time, the original lease and counterpart are mutually cancelled and exchanged; and upon a special verdict finding the 2d lease to be void, the best rent not being reserved; held, that although *A.* had a life-estate, and might have made a good demise for her life, yet the lease referring to the power, it was the intention of the parties it should operate by virtue of the power, and not out of the estate; and, as the second lease is void under the power, and does not operate according to the intention of the parties, it is no surrender of the first; held, also, that the recital is not a note in writing of a substantive act of surrender under the statute of frauds; and that the act of cancelling and exchanging the indentures is not alone a good surrender, since that statute. *Doe dem. Earl of Berkley v. Archbishop of York*, *H. 45 Geo. III.* 166

4. Devise of lands to *A.* and *B.* two sisters, and their heirs forever, upon this condition that, in case they or either of them shall have no lawful issue, they or she having no lawful issue, shall have no power to dispose of her share, except to her sister or sisters, or to their children; and all the rest, &c. of my real, &c. estates, &c. not herein before disposed of, I give to the said *A.* and *B.* their heirs, executors, and assigns; held, to be a devise in fee with a condition in restraint of alienation, partially, and that for breach thereof by levying a fine to the use of *C.* a stranger, the co-heiresses of the testator may enter: the reversion therein not passing by the residuary devise to *A.* and *B.* Held also, one co-heiress tenant in common may bring an ejectment for her share without the rest. *Doe dem. Gill and Wife v. Pearson and Others*, *H. 45 Geo. III.* 295

5. *A.* being seised of the reversion in fee of lands at *P.* expectant upon an estate for life in

himself, with remainder in tail to his daughters, and also seised in fee of a coppice at *A.*; devises sundry other estates, and then devises all other his freehold, copyhold, and leasehold lands and houses or tenements, which he should be possessed of at his decease, and which are not settled in jointure, on his late wife, except the coppice at *A.* which he wills shall always go with his estate at *P.* in the same manner as that estate is settled, to one of his daughters in tail, remainder to another for life, remainder to her children, remainder over, chargeable with an annuity to the said second daughter, and other charges. Held, that the reversion did not pass by this devise, it being wholly inconsistent with the object of such a devise, and therefore not in the intention of the testator. *Goodtitle ex dem. Daniel v. Miles*, *E. 45 Geo. III.* 468

6. *A.* devises land to trustees to raise money by sale or otherwise, and to pay certain legacies; and wills the overplus or reversion thereof to be applied by them as the officiating ministers of the congregation or assembly of people called methodists, that do and shall actually assemble at *L.* shall from time to time think fit to apply the same; and directs that when two or more trustees die, the survivors shall nominate others; Held, the legal estate is in the trustees, and a court of law will not inquire into the trust, which may be to charitable uses or otherwise, and is not void at law within the stat. 9 Geo. II. c. 36, s. 1. *Doe dem. Toone and Another v. Copestake and Bennet*, *E. 45 Geo. III.* 496

7. *A.* after devising lands at *B.* wherein he gives to *F.* and *G.* an estate for life, and also to *D.* an estate for life and to *C.* an estate-tail in remainder, devises, as to his lands at *D.*, to his sister *E.* for life; or if she should survive *F.* and *G.* so that she should come

into the possession of his estate at *B.* then to *H.* for her life; towards the support of *I.* and the said *C.* and after her decease to *C.* and his heirs: Held that upon the death of *E.* and *H.* the remainder to *C.* in the lands at *D.* vests, notwithstanding *E.* did not survive *F.* and *G.* nor come into possession of the estate at *B.* For the will may be read according to the intent of the testator, as if it were "to *E.* for life; and after her decease, if she should survive, &c." it being the intent of the testator to provide for *C.* as well as *I.* who had a previous estate-tail to *C.* in the other estate at *B.* and the testator having professed an intent to devise all his estate, and there being no devise over of the estate at *D.* after the remainder to *C.* and his heirs. *Doe dem. Leech v. Michlem*, 500 45 Geo. III.

8. *A.* devises to *B.* and *T.* in fee, in trust to the use of *W. H.* for life, second son of his daughter *E.* subject to a proviso after mentioned, remainder to trustees, to preserve, &c. during his life; remainder to his first and other sons in tail male, subject as aforesaid; remainder to the second and other sons of *E.* in like manner; remainder to the second son of *E.*'s first son; remainder to *A.*'s granddaughter *C. H.* for life, subject as aforesaid; remainder to trustees to preserve, &c. remainder to her first son in tail male; remainder over, subject to the said proviso, that if *W. H.* or either of the remainder men should become earl of *E.* the use to such person and his issue male should cease, as if such person were dead without issue. *E.* has two sons at *A.*'s death, viz. Lord *E.* and *W. H.* who is in possession of the estate devised. Held, that upon *W. H.* becoming earl of *E.*, *W. C.* the first son of *C. H.* is immediately intitled to an estate in tail male in possession, as he would be intitled in case *W. H.* were then actually dead without

issue. *Carr v. The Earl of Errol and Others*, T. 45 Geo. III. 675

DISCONTINUANCE.

See PRACTICE, No. 19.

DISTRINGAS FOR COSTS.

See PRACTICE, No. 28, p. 66. and *Doe dem. Lintot v. Ford*, H. 407

DRAWER.

See BILL OF EXCHANGE, No. 6.

EJECTMENT.

1. In ejectment, where the plaintiff claims title, under an assignment for the benefit of creditors, on unstamped paper, under the Lords' act, 32 Geo. II. c. 28, the plaintiff must prove the rules of court for the bringing up of the prisoner, and for his discharge, or, at least, the former rule. For, unless there is a rule to bring up the prisoner, the court has no power to order his discharge, and the assignment is not valid, under the above act, without a stamp. *Doe dem. Perring v. Heath*, M. 45 Geo. III.

2. Under a proviso to determine a lease upon notice in writing, two out of three joint-tenants in fee, trustees and executors of the lessor, gave notice, under their hands, to determine the tenancy, the third being out of this country: held, that this notice was insufficient, there being no proof of the assent of the third trustee, previous to the notice: for his assent afterwards cannot be presumed, and it seems, is not sufficient, for as the tenant is to act upon this notice, it ought not to depend upon any act of another, subsequent to its being given. *Right on dem. of Fisher and Others v. Cuthell*, M. 45 Geo. III. 83

3. Where there is a custom, in a manor, that upon the death of the tenant for life, he in remainder shall come in and be admitted tenant and pay a fine, it is a good

custom, and the tenant must be admitted and pay his fine; although the admittance of tenant for life is the admittance of him in remainder. Q. whether an admittance is necessary and a fine is due without a custom to warrant them? The proclamation to the tenant to come in to be admitted is good in such a case, in general terms, and without naming the particular tenant, although in the surrender he is named specially. *Doe dem. Whitbread v. Jenny*, M. 45 Gro. III. 116

4. Where the ancestor died seised, leaving a son and daughter infants, and the son, still an infant, went abroad, and there, as was found by the jury, died under age; held, that the daughter, under the statute of limitations, had only 10 years after her coming of age, or 30 years after the death of the ancestors to bring an ejectment. *Doe dem. George and Wife v. Jenson*, H. 45 Geo. III.

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5. On a lease from year to year of a farm, the tenant to enter on the housing at Old Lady Day, and the land at Old Candlemas, &c. with an agreement to quit at the times of entering, the rent being payable at Old Lady Day and Michaelmas; held, that a notice to quit, half a year before Old Lady Day, which is the substantial entry on the farm, is good, the entry on the land at Old Candlemas day being only in the nature of a liberty. *Semble*, the day of payment of the rent may be always considered as the substantial time of entry. *Doe dem. Strickland v. Spencer and Another*, H. 45 Gro. III.

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6. Held also, one co-heiress tenant in common may bring an ejectment for her share without the rest. *Doe dem. Gill and Wife v. Pearson and Others*, H. 45 Geo. III.

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7. See AGREEMENT, No. 2, and *Doe dem. Bromfield v. Smith*, J.

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ELECTION.

1. See MANDAMUS, No. 2.

2. The conservators and commonalty of the Bedford Level are empowered by stat. 15 Car. II. to elect a register, and other officers. This register is to register all deeds of conveyances; which thereupon have the effect of bargains and sales enrolled, and are of no effect until so registered, and, at such election, only proprietors of 200 acres of fen land, by conveyance so registered, are entitled to vote. They appoint also a deputy register in aid of the register: the register dying, an election is had of a new register; held, that by the death of the principal, the office of the deputy register ceases, and lands held by conveyances registered by him after that time and before the election, do not entitle the proprietors to vote at such election. Such an office is not the subject of a *quo warranto*; for it is no usurpation of a franchise upon the crown; and the proper remedy upon an election, obtained by a majority of such votes, is by mandamus. *Semble*, though, a *quo warranto* should lie in any case, it may not be alone a good cause for refusing a mandamus. *The King v. Conservators of Bedford Level*, E. 45 Geo. III.

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ELECTION, PERJURY AT.

See INDICTMENT, No. 4.

EMANCIPATION OF CHILDREN.

See SETTLEMENT.

ERROR, WRIT OF.

See PRACTICE, No. 9. COSTS IN; See COSTS, No. 2.

ESTATE LEGAL.

See MANDAMUS, No. 5, and *The King v. Cogger*, E.

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ESTATE-TAIL.

See DEVISE, No. 2, and *Pearson v. Vickers*,

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**ESTATE TAIL WITH
CONDITION.**

See **DEVISE**, No. 8, and *Carr v. Earl of Erroll and Others*, T. 576

**ESTATE TO TRUSTEES
TO PRESERVE, &c**

See **DEVISE**, No. 8.

EVIDENCE.

1. Held, that, in an action by a husband on a policy of insurance on the life of his wife, the declarations of the deceased wife, as to her state of health, when ill in bed, are admissible evidence of her state of health, against the husband on a warranty of good health; for, the evidence even of medical men is founded upon the representation of the patient. *Avison v. Lord Kinnaid and Others*, H. 45 Geo. III. See **INSURANCE OF LIFE**. 286

2. See **INDICTMENT**, No. 4.

3. See **PLEADING**, No. 19.

EXCEPTION.

See **DEVISE**, No. 7, and *Dee dem. Leach v. Michlem*, E. 500

EXCISE-MAN, EXTRA.

1. Semble, an extra excise man is entitled to notice under the excise laws, in actions brought against him for any thing done in pursuance of any of the excise laws; or at least, he is entitled to it, as a person acting under an excise officer, if he is sent to make a search in a boat coming on shore, though no excise officer appointed by warrant from the board be present. *Clements and Wife v. Keen*, H. 45 Geo. III. 220

EXTRA EXCISEMAN.

See **EXCISE MAN**, No. 1, and *Clements and Wife v. Keen*, M. 220

EXECUTION.

1. See **MANDAMUS**, No. 1, and

The King v. the Mayor of Glamorgan, M. 8

2. See **PRACTICE** No. 9, and *Anonymous*, M. 60

3. See **ANNUITY**, No. 1, and *Howell et al. v. Stratton* M. 66

FACTOR.

See **TROVER**, No. 5, and *Newton v. Thornton*: 207

FEEES TO STEWARD.

See **COPYHOLD**, No. 5.

FINE.

See **COPYHOLD**, No. 5, and *Attree v. Scull*, E. 449

FLAG OFFICER.

See **PRIZE**, No. 3, and *Harvey v. Cook and Another*, H. 341

**FOREIGN BILL OF
EXCHANGE.**

1. See **BILL OF EXCHANGE**, No. 3.

2. See **BILL OF EXCHANGE**, No. 5, and *Patience v. Townly*, M. 224

**FRAUDULENT ASSIGN-
MENT.**

See **BANKRUPT**, No. 2.

FRIENDLY SOCIETY.

See **INDICTMENT**, No. 1, and *The King v. Inge and Sanderson*. 561

GENERAL DEFENCE ACT.

1. See **STATUTES**, No. 5, *Stat.* 43 Geo III. c. 55, s. 10.

2: On an inquisition to assess damages to the proprietors for the possession of lands, &c. taken for the use of government, under the stat. 43 Geo. III. c. 55, s. 10, called the general defence act, a compensation in a gross sum cannot be awarded but it must be by an annual compensation in the way of rent to be paid to the persons entitled to the land; and the inquisition will be bad, if all the parties interested are

not summoned and properly compensated. *Bingham v. Scrole, M.* 45 Geo. III. 129

GREENLAND FISHERY.

See IMPRESS, No. 2, and *Ex parte Brock, H.* 335

HABEAS CORPUS.

1. See IMPRESS, No. 1, and *Ex parte Robert Douglas, M.* 47

2. See PRACTICE, No. 12, and *Alridge v. Schrader and Tomkins, M.* 75

3. To compel obedience to a writ of Habeas Corpus to bring up an impressed man, the party must first search at the crown-office for the return, and if not found, apply, upon affidavit thereof, for an attachment. *Ex parte Harrison, E.* 45 Geo. III. 408

4. On a motion for a habeas corpus to a private person, on the application of a husband, to bring up the body of his wife, the affidavit must state that she is detained against her will. *The King v. Wiseman Ex parte Newton, T.* 45 Geo. III. 617

HEIR.

See EJECTMENT, No. 4,

HOLIDAY.

See SEAL OFFICE, No. 1, *H.* 403

IMPRESS.

1. *Quare*, whether a freehold estate will exempt a mariner from being impressed? *Semble*. He is not exempted at any rate, unless he has quitted the sea altogether without an *animus revertendi*. *Ex parte Robert Douglas, M.* 45 Geo. III. 47

2. An apprentice in the Greenland Fishery trade is not protected from being impressed beyond three years, though if he be bound for a longer time, the master is bound to keep him in his service under a penalty of 10*l.* by stat. 9 Geo. III. c. 5, s. 5. *Ex parte Brock, H.* 45 Geo. III. 335

INDEMNITY.

See *Cole v. Gower, H.* 245

INDICTMENT.

1. *Semble*. Upon an indictment, for not obeying an order of two justices, under 33 Geo. III. c. 54, s. 15, commanding the defendants, as stewards and principal officers of a Friendly Society, to restore *A. B.* as a member, it must be shewn, that, by the constitution of the society, the defendants have the power to restore him. *The King v. Inge and Sanderson, M.* 45 Geo. III. 56

2. The court refused a new trial in an indictment for a misdemeanor for not repairing a wall, though moved on the ground of a misdirection by the judge. *The King v. Reynell, Clerk, E.* 45 Geo. III. 407

3. See NUISANCE, No. 2, and *The King v. Russell, E.* 424

4. On an indictment for perjury at an election, in polling in the name of *A. B.* on a certain day, evidence that the defendant, not being a freeholder and entitled to vote, polled and was sworn, though it does not appear by what name, is evidence to be left to the jury that the defendant polled in the name of *A. B.* and in that name took a false oath; for it shall not be presumed that there was more than one false oath; and if the defendant polled in his own name, he might prove it or rebut the presumption, by shewing that there was more than one false oath taken, in which case the identical oath could not be ascertained. *The King v. Prior, alias John Wright, E.* 43 Geo. III. 526

5. An indictment for that *A.* intending to do bodily harm and mischief to *B.* and to break the peace, did send a certain letter to him, to provoke him to send him a challenge, is good; although the jury find on a former count, charging the same letter, to be a challenge, that the defendant was not guilty. *The King v. Phillips, E.* 45 Geo. III. 551

INSOLVENT.

INDORSEMENT ON BILL OF SALE.

See *REGISTRY*, No. 1.

INDEMNITY.

See *Cole v. Gower*, H. 246

INFANT.

Where lands have been taken for the service of government, under the statute 44 Geo. III. c. 95, and an application is made to the court of Exchequer, to lay out the purchase-money in government securities to the uses of a certain will, that will must be produced in court, attested by one of the subscribing witnesses, on affidavit, and the court will not make an order, upon production of the probate only. In the Matter of *Charles Templer*, an infant in *Scacc.* M. 45 Geo. III.

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INFORMATION.

1. Information at common law, that *A.* wrote to *B.* and informed him "that he was applied to, to prosecute him, upon the stamp acts, and that he *A.* had informed the parties the prosecution must be carried on by the public officer, and requested *B.* to write to him, *A.* and he would make the best terms in stopping it," without averring that *B.* had been guilty of any offence for which such prosecution would lie, and when *A.* did not actually extort any money, held bad; for the bare threat was too weak to extort money, and therefore was no offence at common law, but was punishable under the statute 18 Eliz. c. 5, s. 3. *The King v. Southerton*, H. 45 Geo. III. 305

INSOLVENT.

1. Where a prisoner, in order to be discharged under the insolvent act, 44 Geo. III. c. 108, applies to have the sum in the committur in the marshal's book,

INSURANCE.

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reduced below 1500l. alleging a mistake in the original judgment or entry, the court will require the most satisfactory affidavits from the parties interested, in order to shew that it is a fair case of mistake, and that it is not an after-thought and collusion between the plaintiff and the defendant. *Ex parte Mary Wilkins*, M. 45 Geo. III. 62

2. A prisoner, who was in the actual custody of the keeper of a certain prison, on the 1st day of January, 1804, and has since been removed into the custody of the keeper of another prison, is not entitled to the benefit of the insolvent act of the 44 Geo. III. c. 108. *Ex parte Abraham Ergas*, and *Ex parte J. Evans and Others*, M. 45 Geo. III. 70

INSIMUL COMPUTASSIT.

See *PLEADING*, No. 11.

INSURANCE.

1. On a policy of insurance, with or without letter of marque, and liberty to chase, capture, and man, the assured cannot delay on the voyage, merely for the purpose of conveying the prize into a port of condemnation; neither is such a liberty to be inferred from the instructions and articles given with the letter of marque, "to carry into port," &c. *Semble*. It is no deviation to delay for the purpose of giving assistance to a ship in distress. *Lawrence v. Sidebotham*, H. 45 Geo. III. 215

2. *Query*, Whether under a liberty to take a letter of marque, the vessel insured shall have liberty to chase any ship which she may meet in the course of her voyage, for the purpose of hostile capture, and not for mere defence: and whether the usage of merchants has determined that such is or is not the meaning of such a liberty. *Parr v. Anderson*, H. 45 Geo. III. 317

498 INSURANCE FROM FIRE. LANDLORD AND TENANT.

3. Goods being shipped on board an *American* ship, the *President*, a policy was effected by mistake, calling it the good ship called the *American ship President*; or by what other name the said ship is or shall be called; held, that the plaintiff was intitled to recover under the general auxiliary words, there being no fraud, although it was the intention of the plaintiff to have stated the ship to be an *American*, and by the form of the policy there was no warranty that the ship was an *American*. *Le Mesurier v. Vaughan*, E. 45 Geo. III. 492

INSURANCE FROM FIRE.

A policy of insurance was made for a year in writing, with an article, that on bespeaking policies, all persons are to make a deposit for the policy, &c. and shall pay the premium to the next quarter day, and from thence for one year more at the least; and shall, as long as the insurers agree to accept the same, make all future payments annually within fifteen days after the day limited in their respective policies, upon pain of forfeiture of the benefit thereof; and no insurance to take place till the premium be actually paid; but this was explained by an advertisement, that the office considered all persons insured by policies for a year or more, as insured for fifteen days beyond the expiration of their policies. Held, that the fifteen days are allowed only in case it is intended to renew the policy; and that if the office gives notice before, or during the fifteen days, that they will not accept the premium, and a loss happens afterwards during the fifteen days, the office is not liable. *Salvin and Another v. James and Another*, T. 45 Geo. III. 646

INSURANCE OF LIFE.

Held, that, in an action by a husband on a policy of insurance

on the life of his wife, the declarations of the deceased wife, as to her state of health, when ill in bed, are admissible evidence of her state of health, against the husband on a warranty of good health; for, the evidence even of medical men is founded upon the representation of the patient. *Avison v. Lord Kinnaird and Others*, H. 45 Geo. III. 286

JOINT-TENANT.

See EJECTMENT, No. 2.

IRELAND.

See PLEADING, No. 23.

IRREGULARITY.

See PRACTICE, No. 22.

JUDGMENT.

1. See PLEADING, No. 4.
2. See ANNUITY, No. 1.

JUSTICES.

1. See NOTICE, and *Jones v. Vaughan and Hall*, M. 5
2. See MASTER and SERVANT, No. 1.

JUSTIFICATION OF BAIL.

See BAIL, No. 4.

KING'S WAREHOUSE.

See TROVER, No. 4. and *McCombie v. Davie*, E. 557

LACHES.

See BILL of EXCHANGE, No. 4.

LANDLORD AND TENANT.

1. See EJECTMENT, No. 5.
2. See AGREEMENT, No. 2.
3. *Semble*. Case will not lie upon an implied condition by a tenant at will to do tenantable repair or reasonable repair, so as to subject him to an action for permissive waste. There must

be an express covenant or an assumpsit to render him liable. *Gibson v. Wells* 45 Geo. III. 677

LEASE.

1. See EJECTMENT, No. 2.
2. See DEVISE, No. 3, and *Earl of Berkley v. Archbishop of York*, M. 167
3. See TRESPASS, No. 5.

LETTER OF MARQUE.

See INSURANCE, No. 2, and *Parr v. Anderson*, H. 317

LIBEL.

1. See ACTION ON THE CASE, No. 1.
2. See PLEADING, No. 5, and *Woolnoth v. Meadows*, M. 28
3. See PLEADING, No. 20, and *The King v. Johnson*, T. 591

LIEN.

See COMMON CARRIER, No. 1. and *Rushforth and Others v. Hadfield and Others*, T. 634

LIMITATIONS, STATUTE OF.

1. Where the ancestor died seised, leaving a son and daughter infants, and the son, still an infant, went abroad, and there, as was found by the jury, died under age; held, that the daughter, under the statute of limitations, had only 10 years after her coming of age, or 20 years after the death of the ancestor to bring an ejectment. *Doe dem. of George and Wife v. Jesson*, H. 45 Geo. III. 236
2. See ACTION ON THE CASE, No. 5.

LORD OF THE MANOR.

See MANDAMUS.

LORD's ACT.

1. See EJECTMENT, No. 1.
2. See PRACTICE, No. 3.
3. A note to pay a prisoner his

sixpences was written upon the same paper with an affidavit to verify the plaintiff's hand-writing thereto: held, that the affidavit not being duly entitled in the cause, although the note was so, could not be aided by reference, and could not be read; wherefore the prisoner was discharged. *Buckley v. Tweedie*, E. 45 Geo. III. 394

MANDAMUS.

1. Where, on a mandamus to admit a freeman, the party pleads, and damages and costs are given to the prosecutor, he is entitled to levy in execution for the sheriff's poundage also, under 43 Geo. III. c. 46. *The King v. The Mayor of Glamorgan*, M. 45 Geo. III. 8

2. The trustees of a chapel of Dissenters, which, for want of a pastor, had been without a congregation, engaged with a new pastor for a year, at a salary; he gave notice in the paper of opening the chapel, and, on the first day of opening, gave notice to the congregation there, that they should proceed to an election of a pastor after divine service that day, and accordingly took votes. Upon being dispossessed by the trustees, after the year, he applied for a mandamus to be restored, alleging, that he was elected by the congregation for life. The court refused to grant it, on the ground, that, supposing there was a competent body to elect, there was not sufficient notice given of the election; and therefore they left the party to try his right in an action. To found such an application, there must be a probable colour of an election laid before the court. *The King v. the Trustees of Dagger Lane Chapel*, M. 45 Geo. III. 21

3. Where a rule has been obtained for a mandamus to issue, and the mandamus is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a

mandamus, but materially enlarging the terms, the court will quash the mandamus: notwithstanding, perhaps, they would have granted a rule as large, if it had been applied for, upon the same affidavits; and they will not upon motion to quash it, amend the rule to support the mandamus. The party ought, if there is a mistake, to apply to amend his rule before the mandamus issues. *Rex v. the Lord and Steward of Water Eaton*, M. 45 Geo. III. 54

4. A mandamus to compel a magistrate to enforce a conviction for the plaintiff, refused, where he had returned that the defendant was convicted of the penalty before him, but that the said conviction was invalid in law, and that there was not an offence for which the said penalty was payable or could legally be levied. *The King v. Robinson*, H. 45 Geo. III. 274

5. See PRACTICE, No. 30.

6. A mandamus may be granted to admit to a copyhold estate the person who appears to have the legal estate, without regard to his equity. *The King v. Cogges*, H. 45 Geo. III. 417

7. See ELECTION, No. 2. and *The King v. the Conservators of Bedford Level*, E. 536

MASTER AND SERVANT.

Upon an order of justices, under 42 Geo. II. c. 92, s. 41; and 43 Geo. III. c. 82, s. 44, against a master to pay 5*l.* to his servant, who was enrolled in the army of reserve, held, that after notice of the order and 21 days elapsed, and the order confirmed upon appeal to the quarter sessions, the sum might be levied by warrant of distress; without shewing a demand by the servant or militia man, &c. after the determination of the appeal. *Wood v. Harvey*, H. 45 Geo. III. 238

MAYOR'S COURT.

See PRACTICE, No. 12.

NUISANCE.

MONEY HAD AND RECEIVED.

See ANNUITY, No. 2, and *Scurfield v. Gowland*, H. 332

NAVY AGENT.

See Stat. 31 Geo. II. c. 10, s. 30, and *Walsh v. Toutmin and Another*, T. 607

NEW TRIAL.

See INDICTMENT, No. 2, and *The King v. Reynell, Clerk*, H. 477

NEXT POST.

See BILL of EXCHANGE, No. 4.

NON-PROS.

See PRACTICE, No. 27, p. 66.

NOTE FOR PRISONER'S SIXPENCES.

See LORD'S ACT, No. 3.

NOTICE TO CONSTABLES.

Under 24 Geo. II. c. 44. *Jones v. Vaughan and Others*, M. 6

NOTICE TO DRAWER.

See BILL of EXCHANGE, No. 4. *Darbyshire and Another v. Parker*, M. 196

NOTICE TO INDORSER.

See BILL of EXCHANGE, No. 8, and *Pearson v. Crailan*, H. 404

NOTICE TO JUSTICES.

See REPLEVIN.

NOTICE TO QUIT.

1. See EJECTMENT, No. 2.
2. See EJECTMENT, No. 5, and *Doe dem. Strickland v. Spencer and Another*, H. 255

NUISANCE.

1. If a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass;

and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. The cases put in 2 *Rol. Abr.* 144, b. Nuisance, Reformation, (S.) are only put by way of instance. *Raihes v. Townsend and Another*, M. 45 Geo. III.

2. *Scmble*. A stoppage in the street for the purpose of unloading waggons at an inn or warehouse, may, by its frequency become a nuisance, and the party be obliged to remove his business to a more convenient place for the public. *The King v. Russel*, E. 45 Geo. III.

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ORDER OF JUSTICES.

See POOR-RATE, No 3.

ORDER OF REMOVAL.

An order of removal dated the — day of *April*, 1804, is good, though with a — date, or at least is helped by appeal to the quarter sessions. *The King v. the Inhabitants of Brimpton*, H. 45 Geo. III.

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PAPERS.

See PRACTICE, No. 30.

PAUPER RUNAWAY.

See POOR-RATE, No. 3, and *table v. Dickson*, H.

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PENAL ACTION.

See PRACTICE, No. 16, 18, and *Hanson qui tam v. Sprange*, M.

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PENALTY OF BAIL-BOND.

See PRACTICE, No. 21.

PERJURY.

See INDICTMENT, No. 4, and *The King v. Price, alias Wright*, E.

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PLEA TO THE JURISDICTION.

See PLEADING, No. 20.

PLEA, DEMAND OF.

See DEMAND of PLEA.

PLEADING.

1. Whether the suit against the principal be by bill or original, the venue in a sci. fa. may be in *Middlesex*; for a sci. fa. being a local action founded upon a record, the proper venue is, where the record, (i. e. the recognizance of bail) is, and that recognizance, in the K. B. is a record in *Middlesex*. *Coxeter and Another v. Burke*, M. 45 Geo. III.

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2. Where, on a special agreement, one party is to do an act and to pay money on a certain day and the other in the mean time to do another act, in consideration thereof, and the former pays the money before the day, and permits the agreement to be in part performed, but the whole is not completed within the time, and the other party fails in a substantive and separate part of his agreement, before the day; he who would rescind the contract must do so immediately upon the expiration of that day, and should not continue to act under the agreement. As, where in consideration of 10l. to be paid in ten days, A. agrees to execute a lease to B. at the end of that time, and to do certain repairs before the executing of the lease, but possession is to be given immediately, and B. enters and pays the 10l. immediately, and the repairs not being done, B. some time after the ten days, quits possession, he cannot consider the contract as rescinded, and bring an action for money had and received. Where a contract is rescinded, the parties must be put in the same situation as before. *Hunt v. Silk*, M. 45 Geo. III.

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3. In assumpsit, the plaintiff declared, that in consideration that he would permit the defendant to occupy a house for four weeks, at ten guineas per week, the defendant undertook to pay "the said rent," and the plaintiff recovered, though the defendant

never took possession, and, though no other promise was proved, than that the defendant said she would take the house upon the terms. The said rent, in such a declaration, means the said sum in gross. The letting and hiring is evidence of an express promise sufficiently to enable the party to bring assumpsit. *Grogory v. Badcock*, M. 45 G. o. III. 18

4. *Nul tiel* record is no plea to debt brought here, on a judgment in the court of Exchequer in Ireland. *Collins v. Lord Matthew*, M. 45 Geo III. 25

5. Declaration that the defendant, maliciously intending to subject the plaintiff to the penalties against persons guilty of the horrible and detestable crime of, &c. said of the plaintiff that "his character was infamous; he would be a disgrace to any society; if he was inrolled in the Royal Society, he would cause his name to be erased; delicacy forbade him to make a direct charge, but it was a male child of nine years, that complained to him;" meaning that a male child of nine years old had complained of an unnatural crime committed by the plaintiff upon such child; with an averment that the defendant uttered the words with intent to convey, and they were by the persons to whom, &c. understood to mean that the plaintiff had committed that horrible crime of, &c. Held sufficient, without a colloquium more fully explanatory; for the words are sufficiently plain without an innuendo. *Woolnoth v. Meadows*, M. 45 Geo. III. 28

6. See BILL of EXCHANGE, Nos. 2, and *Smith v. McClure*, E. 443

7. See BILL of EXCHANGE, No. 9, and *Held v. Johnson*, M. 44

8. Where a declaration stated an undertaking to carry safely certain goods by water, with an exception of all accidents arising from the act of God, the king's

enemies, fire, pirates, and all other dangers and accidents of the seas, rivers, and navigation of what nature or kind soever; held that this exception being beyond the common law exception, must be specially proved. *Richardson v. Sewell*, H. 45 Geo. III. 205

9. See INFORMATION, No. 1, and page 305

10. In assumpsit on the warranty of a horse, where the warranty was "sound in the eye, &c. except a slight snap, which will be well in a few days;" held, that the exception was material, and should be stated in the declaration, although if the exception had not been made, it might not have been an unsoundness under the general warranty. *Morris v. Lithgoe*, E. 45 Geo. III. 375

11. Where the defendant had obtained his certificate under a commission of bankruptcy, after plea pleaded, and then pleaded it *puis darrein continuance*, but in fact, two continuances had elapsed, and the plaintiff had gone to trial, without noticing the plea; the court permitted him to amend, pleading it *nunc pro tunc*, upon payment of the costs between the last continuance and the time of filing the plea. A plea *puis darrein continuance*, though not a plea in abatement, must be verified by affidavit, both when pleaded at *nisi prius* and when pleaded in bank. *Willoughby v. Wilkins*, E. 45 G. o. III. 396

12. A count for goods sold by A. as administrator of B. may be joined with an *insimul computassit*, between B. and A. as administrator, whether the sale or account be in the personal or representative character; for both being stated as considerations accruing, and promises made between the same parties, the costs in each case would go to the same fund, whether to the intestate's estate or that of the administrator; and the reason why counts on promises made to the intestate cannot be joined with counts on promises

to the executor is, because the costs are entire, and cannot be severed. *Cowell and Wife v. Watts*, E. 45 Geo. III. 411

13. See CONVICTION, No. 3; and *The King v. Nield and Others*, E. 45 Geo. III. 418

14. Plea of bankruptcy generally after the making of the promises without stating that the defendant conformed to the statutes of bankruptcy, &c. held good. *Semble*. The case of *Paris v. Salkeld* is not law. *Tower v. Cameron and Another*, M. 45 Geo. III. 438

15. A declaration that *A.* on a certain day and on divers other days made an assault on *B.* held bad on special demurrer; *aliter*, if stated that *A.* on, &c. and on divers days assaulted *B.* *English v. Purser*, 45 Geo. III. 445

16. To debt on arbitration bond of all matters in difference, averring that the arbitrators took upon themselves the arbitration, and awarded, &c. The defendant pleaded that all matters were submitted, &c. that there were disputes as to monies claimed by him of the other party, and that the arbitrators took upon themselves to arbitrate of and concerning, &c. and that they made no award of those sums. The plaintiff replied, that the arbitrators made their award of and concerning, &c. as in the declaration; to which there was a demurrer: held, that the plea was bad for want of averring that the arbitrators had notice of the claims of the defendant, and refused to arbitrate concerning them: *Elson and Another v. Roffe*, E. 45 Geo. III. 459

16. In debt for use and occupation, the plaintiff may declare generally for the use and occupation of divers messuages, lands, and tenements, without specifying where they are situate. *King v. Frazer*, E. 45 Geo. III. 462

18. An action for criminal conversation with the wife of the plaintiff is an action upon the

case, and the proper plea is not guilty within six years. *McFadden v. Ollivant*, E. 45 Geo. III. 486

19. In assumpsit for the purchase-money of an estate where the condition of sale was to pay on or before the 14th of June, on having a good title; the plaintiff averred that he was seised in fee and made a good and satisfactory title to the defendant, before the 24th of June: held sufficient without further particularising the title. *Martin and Others v. Smith*, E. 45 Geo. III. 543

20. In avowry for rent in arrear for two years and a quarter, under a *scilicet*, where the issue is upon the tenure, it is not necessary to prove the whole rent to be due for the whole of the time; but it is sufficient to prove rent due for any part of it. *Forty v. Imber*, E. 45 Geo. III. 548

21. To an indictment for a libel in England, the defendant cannot plead that there are and were before the union, courts competent in Ireland to the trial of offences, and that he was born and commorant there at the time of the publication of the supposed libel; for this plea doth not shew a jurisdiction in any other court, and is a mere not guilty. *The King v. Johnson*, T. 45 Geo. III. 591

22. A count that the defendant in consideration that the plaintiff had sold and delivered divers goods, undertook to pay *quantum valebant*, upon demand, with an averment that the said goods were worth 20*l.* whereby an action hath accrued to the plaintiff, is not a good count in debt, and cannot be joined in a declaration with counts in debt. *Dalton v. Smith*, T. 45 Geo. III. 618

23. In assumpsit, in the common form, against a common carrier for not delivering a box delivered to him to be carried safely, the plaintiff, if the defendant proves a notice not to be accountable for more than 5*l.* unless the goods are entered according to their value, may recover the said

31. although the declaration contains no special count in assumption, upon the notice for 31. *Clark v. Grey*, T. 45 Geo. III. 622

24. A bond, by a receiver of rents, reciting in the condition that he had agreed to collect rents for a certain company for twelve months, and the company having required security for the due performance of the said office, in manner or to the effect after mentioned, that A. B. had agreed to become surety for him; afterwards in the condition, contains more general words binding him to his faithful service, during such time as he shall be employed by the said company and their successors: held, upon demurrer, that the recital restrains the operation of the general words of the condition, and that it is not forfeited by any breach of duty, after the expiration of the twelve months. *The Proprietors of Liverpool Water-Works v. Atkinson*, T. 45 Geo. III. 655

25. After issue, notice of trial, putting off the trial till a subsequent term, and a plea of bankruptcy, *puis darrain continuance*, the court gave leave to amend that plea without imposing the terms that the plaintiff should be at liberty to discontinue without costs, but imposing terms as to continuing the notice of the trial, and taking short notice. Q. How bankruptcy is to be pleaded *puis darrain continuance*. *Lindo v. Simpson*, T. 45 Geo. III. 659

26. See PRACTICE, No. 37.

27. See LANDLORD and TENANT, No. 3.

POOR.

Overseers of the poor should proceed to take an indemnity, in cases of bastardy, from the putative father, under the statute 6 Geo. II. c. 31, s. 1, and cannot commute the same for a specific sum; and all notes and all other securities given for payment of money absolutely, in such case,

are, in law, only to be considered as mere contracts of indemnity, upon which the payee or obligee can recover only such sum as the parish shall have expended.

Semble. It is not necessary, however, that the compulsory provisions of that statute should be pursued, but the security must be substantially such as is thereby required. *Cole v. Gower*, H. 45 Geo. III. 246

See SETTLEMENT.

POOR-RATE.

1. A corporation having lands used as a common of pasture, and stocked by such resident burgesses as think fit, according to a certain annual stint fixed by the leet-jury, and for which the burgesses who stock the common pay 19s. 4d. per annum, to each of those who do not: held, that certain resident burgesses, having such right to stock, and stocking the land, for a certain year, were the occupiers of the land as tenants in common, and were, therefore, rateable to the poor's rate, in respect thereof. Q. Whether a mere right of common in gross is rateable? *The King v. Watson*, M. 45 Geo. III. 145

2. Stocks or annuities in the public funds are not rateable to the poor's rates, under the 43 Eliz. c. 2, nor "as money out at interest," under 10 Anne, c. 6, private acts, which impowers a rate to be made at *Norwich*, "on all persons having and using stocks and personal estates in the said city, or having money out at interest." *The King v. St. John's, Maddermarket*, H. 45 Geo. III. 270

3. An order of removal dated the — day of *April*, 1804, is good, though with a — date, or at least is helped by appeal to the quarter sessions. *The King v. the Inhabitants of Brimpton*, H. 45 Geo. III. 277

3. Two justices, by order under 5 Geo. I. c. 8, s. 1, directed the overseers, &c. to receive the an-

nual rents and profits of the lands and tenements of *A. B.* a pauper, who had run away from his family, and to certify to the next sessions, &c.; the sessions confirmed the said order, and directed them to receive the sum of 7l. 16s. rent, of the rents and profits of the lands of *A. B.*; held, upon demurrer, in an action of covenant between the pauper and his tenant, that these orders extend only to one specific sum of 7l. 16s. and do not authorise the seizing of the annual profits from time to time. *Semble.* The order should always be specific, to receive so much of the annual rents and profits, or, at least, for a certain time; for the purview of the statute is to seize so much thereof, as shall seem necessary, &c. *Stable v. Dixon*, *H. 45 Geo. III.* 278

POWER.

1. See DEVISE, No. 3.
2. See APPOINTMENT, No. 1.

POWER OF ATTORNEY.

See ATTORNEY, POWER OF.

PRACTICE.

1. Where a prisoner applies for day-rules beyond the usual time, and obtains them, and it is necessary to apply for longer time in the same term, the court will require him to state how he has employed the time before granted. *Day-Rules*, 45 *Geo. III.* 5

2. Where the defendant moves to stay proceedings on a bail-bond, and the plaintiff has not lost a trial, he is not entitled to impose terms of receiving a declaration in the original action, pleading issuably, and taking short notice of trial, so that the plaintiff may go to trial within the term. He is only entitled to costs. Vide *Tidd's Practice*, 158. *Ed.* 1799, and *R. M.* 8 *Anne Reg.*

1. (*c.*) *Cowp.* 71, there cited, *contra*. No affidavit of merits is necessary in such case. *Adams v. Thompson*, *M.* 45 *Geo. III.* 13

3. The exception in the Lord's

act, 32 *Geo. II. c. 28, s. 24*, applies only to persons having taken the benefit of general insolvent acts; not to persons discharged under the Lords' act. The former cannot have the benefit of the Lords' act; the latter may. *Jallassio v. Longhurst*, *M.* 45 *Geo. III.* 24

4. See DAY-RULES, No. 2; and page 27

5. *A.* and *B.* interchangeably accept accommodation-bills; *B.*'s bills are discounted with *C.* who, upon their becoming due, agrees to renew them; but *A.* having fallen into discredit, *C.* does not take his name to the bills, but draws for the amount on *B.* only: before these new bills become due, *A.* becomes bankrupt. *Semble*, *B.* might have proved under *A.*'s commission, for the former accommodation-bills, this being a payment, as it were, of those bills. *B.* having arrested *A.* for the amount of the bills paid to *C.* after *A.* obtained his certificate, the court discharged *A.* upon filing common bail. *Franco v. Dubois*, 45 *Geo. III.* 36

6. In an action of covenant, where the defendant is not arrested, if the plaintiff obtains judgment and has execution, by *fi. fa.* for part of the damages, he may hold the defendant to bail in an action upon the judgment for the residue. *Hesse v. Stevenson* in the Common Pleas, *M.* 45 *Geo. III.* 39

7. In a declaration by the indorsee against the acceptor, on a bill of exchange, it is not necessary to aver that the acceptor had notice of the indorsement. *Semble.* In an action upon a bill of exchange, with money counts also, where the plaintiff has judgment in demurrer upon the count on the bill of exchange, he cannot obtain a rule to compute principal, interest, and costs, without first entering a *nolle prosequi*, on the money counts. How he must proceed in vacation upon a summons before a judge for that purpose, see the note to this case. *Herald v. Johnson*, *M.* 45 *Geo. III.* 44

8. Where, upon putting off a trial, the bail had paid 2000*l.* into court, for the defendant, to abide the event of the suit, and the suit afterwards abated by the death of the defendant, they were permitted to take the money out of court; notwithstanding the plaintiff and the administrator of the defendant insisted that it should be paid over to the plaintiff or to the administrator of the defendant. *Ward v. Lowring*, M. 45 Geo. III.

9. A confession, that a writ of error is brought for delay, sworn to have been made by "a gentleman who attended the taxation of costs for the defendant's attorney on the behalf of the defendant," is not sufficient to warrant the issuing of an execution, pending a writ of error. Such a confession has never been relied upon, except when made by the defendant or his attorney. *Anonymous*, M. 45 Geo. III.

10. An affidavit of merits may be made by the managing clerk to the defendant's attorney, who may know more of the cause than the attorney himself. *Affidavit of Merits*, M. 45 Geo. III.

11. On demanding the execution of a deed, directed by an arbitrator, where such demand is made by a third person, it is not necessary that such person should be empowered by deed or power of attorney, in order to enable the party to have an attachment. Though it may be so where the demand is of money directed to be paid to the party. *Kenyon v. Grayson*, M. 45 Geo. III.

12. In a cause removed by *Na. Cor.* from the mayor's court, bail having been put in, the plaintiff served a rule, for better bail, wrongly entitled *A. v. B.* instead of *A. v. B. and C.* The defendant thereupon gave notice of justification of the same bail, and afterwards that he should add one and justify: held, this was a waiver of the irregularity, for it is not usual to give notice of justifi-

cation without an exception, though it may be done, and therefore, the notice of justification refers to and adopts the rule for better bail. *Aldridge v. Schrader and Tomkins*, M. 45 Geo. III.

13. If the affidavit of debt, to hold to bail, omits wholly to negative the tender of the debt in bank-notes, the defendant is entitled to be discharged upon filing common bail: but a mere slip or defect in the manner of denying such a tender is aided by stat. 43 Geo. III. c. 18. *Wood v. Jenkins*, M. 45 Geo. III.

14. Evidence of facts arising abroad, are not evidence to be referred to the county in *England* where the venue is laid, so as to satisfy the undertaking to give evidence in that county upon bringing back the venue; and the case of *Gerrard v. De Robeck*, 1 H. Bl. 282, has not since been acted upon. *Preston and Others v. Stratton and Another*, 45 Geo. III.

15. A demand of plea may be made before a rule to plead is given. *Maxwell v. Sherritt*, M. 45 Geo. III.

16. Where, on a penal action on the stat. 13 Geo. II. c. 19, a part of the penalty was given to the poor, the court would not give the parties leave to compound; the overseers, at a vestry, having agreed to compound without receiving any part of the penalty. *Hunson quitam v. Sprange*, H. 45 Geo. III.

17. Where the defendant was rendered in discharge of bail, and the defendant's attorney called to give notice of render that night, but finding no one in the way saw the plaintiff's attorney the next morning; and then gave notice: held, that an attachment against the sheriff moved for on that day, although the instructions to the counsel were given before the notice, was irregular, and the attachment accordingly set aside. *The King v. the late Sheriff of Middlesex*, H. 45 Geo. III.

18. When a plaintiff in error had sued out his writ of error in time to stay execution, &c. but had made a mistake in the name of the defendant, in error, and the defendant in error had issued execution, this court allowed the plaintiff in error to have a rule to shew cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule in order to allow the plaintiff in error, to amend his writ. *N. B.* The original action was for a penalty by a common informer, and there was real error. *Barnard qui tam. v. Guy, H. 45 Geo. III.*

259

19. Administratrix allowed to discontinue without payment of costs. *Wright v. Jones, H. 45 Geo. III.*

260

20. See DAY-RULES, and *Ex parte Coppinger, H.*

339

21. *Semble*, Where the bail are let in upon terms to try the cause of the principal, the money levied to abide the event, and the bail-bond to stand as a security; the bail are not liable beyond the penalty on the bond, although the debt and costs exceed the same after the trial, and the plaintiff's debt would have been fully covered by the security, when the bail was first let in to try upon terms. *Goss v. Harrison, H. 45 Geo. III.*

354

22. If a party lies by after an irregularity in the proceedings, and knowingly permits the other party to take a further step in the cause, before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity, as taking a step himself. *Gaire v. Goodman, E. 45 Geo. III.*

391

23. *Special capias*, omitting the christian names of two of the defendants, amended by inserting them, though nothing to amend by, upon payment of costs, and the costs of the application. *Rutherford v. Mein and Others, F. 45 Geo. III.*

392

24. After plea in abatement (or other plea as it seems) irregularly filed, and which the plaintiff treats as a nullity, it is not necessary to demand a plea, previous to the signing of judgment, as for want of a plea.

Anonymous, E. 45 Geo. III.

393

25. Where the defendant had obtained his certificate under a commission of bankruptcy, after plea pleaded, and then pleaded it *puis darrein continuance*, but in fact, two continuances had elapsed, and the plaintiff had gone to trial, without noticing the plea; the court permitted him to amend, pleading it *nunc pro tunc*, upon payment of the costs between the last continuance, and the time of filing the plea. A plea, *puis darrein continuance*, though not a plea in abatement, must be verified by affidavit both when pleaded at *nisi prius*, and when pleaded in bank. *Willoughby v. Wilkins, E. 45 Geo. III.*

396

26. The bail in B. R. are only liable jointly or severally to the amount of the sum sworn to in the affidavit to hold to bail, and the costs. *Jacob v. Bowen, E. 45 Geo. III.*

402

27. On a bill of *Middlesex* returnable early in *Michaelmas* term, the defendant filed common bail after the *Essoign*-day of *Hilary* term, but before the first day of *Hilary* term; held, that he might sign judgment of *non pros*, though he did not give notice of filing common bail. *Prickmore v. Bradley, E. 45 Geo. III.*

405

28. Where a lessor of the plaintiff dies, after nonsuit in ejectment, the court will not grant a *distringas* upon his goods for a contempt in the executor, in not obeying the order, upon the consent rule, to pay costs: and the case not being within the stat 17 Car. II. c. 8, the defendant seems without remedy for his costs. *Doe dem Lintot v. Ford, E. 45 Geo. III.*

407

29. To compel obedience to a writ of *Habeas Corpus* to bring up an

impressed man, the party must first search at the crown-office for the return, and if not found, apply, upon affidavit thereof, for an attachment. *Ex parte Harrison*, E. 45 Geo. III. 408

30. The court refused to grant a rule upon an attorney to deliver up papers, where he was employed as a mere agent and receiver, and not as an attorney in a cause, and where the court would have had no power to have granted a *mandamus* against him to deliver up papers had he not been an attorney. The power of the court over its officers, does not extend to make it a substitution for a court of equity, by proceeding against them by motion. *Cocks v. Harman*, E. 45 Geo. III. 409

31. Where a bankrupt brought trespass against the messenger to the commission, in which action he was non-suited, without the validity of the commission being fully tried, and afterwards brought trover against the assignees to try the same question; held, that he should not be put to give security for costs. *Semble*. Aliter, if the question had been once fully tried. *Kennet v. Duff*, E. 45 Geo. III. 423

32. Where the defendant had changed the venue, and the plaintiff moved to bring it back, upon the ground that the cause of action did not arise wholly in that county, but partly in a third county, the court refused to bring it back, because the plaintiff could not undertake to give material evidence in the county to which he would bring it back.

The court will not bring the venue back unless the party can undertake to give material evidence. *Price and Others v. Woodburn*, E. 45 Geo. III. 447

33. Where the plaintiff has taken an assignment of, and instituted proceedings on the bail-bond, he is prevented from proceeding in the original action. If, therefore, the bail being fixed,

and such proceedings being had, the defendant upon having put in bail above, applies to stay proceedings upon the bail-bond, on payment of costs, and before the expiration of the rule *nisi* the plaintiff has lost a trial, he is entitled to have the bail-bond stand as a security; for the rule *nisi* is a further stay of proceedings, and the loss of a trial was not occasioned by his *laches*. *Eyton v. Beattie*, E. 45 Geo. III. 439

34. Where an affidavit to hold to bail stated the deponent to reside at a certain place, which was not the true place of his abode, according to the rule of court; held, that it was not informal, so as to warrant the proceedings to be set aside, or the defendant to be discharged upon common bail. *Anonymous*, H. 45 Geo. III. 207

35. See HABEAS CORPUS, No. 4, and *The King v. Wiseman* *Ex parte Newton*, T. 617

36. A promissory note to pay a prisoner his sixpences is valid, though it does not state the style of the court in which the action against him is brought; therefore that circumstance will not entitle him to his discharge. *Anonymous*, T. 45 Geo. III. 643

37. Where there is a bond for performance of articles, the statute of 8 & 9 W. III. c. 8. is compulsory on the plaintiff to assign breaches. *W'elsh v. Ireland*, T. 45 Geo. III. 666

38. To entitle the defendant to costs under 43 Geo. III. c. 46, s. 3, there must be an actual recovery by law, and a compromise for less than the sum sworn to will not entitle the defendant to costs. *Linthwaite v. Bellings*, 45 Geo. III. 667

39. There is no compulsion upon a defendant to make a set-off, and if he pleases, he may bring a cross-action; provided he and his attorney choose to incur the odium of an obstinate and litigious character, and the censure of the court; which will tol-

low, unless good reason can be shewn for not pleading such set-off. *Green v. Law*, 45 Geo. III.

668

40. Where an indictment has been removed by certiorari, and the defendant moves to withdraw his plea of not guilty, and to demur, the costs follow the judgment, as upon a conviction, and the motion will be granted without terms as to costs. *Semble*, obtaining a bill of exchange by false pretences, is not obtaining money, goods, &c. under the statute against cheats. *The King v. Binkes*, T. 45 Geo. III.

620

41. After issue, notice of trial, putting off the trial till a subsequent term, and a plea of bankruptcy, *puis darrein continuance*, the court gave leave to amend that plea without imposing the terms that the plaintiff should be at liberty to discontinue without costs, but imposing terms as to continuing the notice of trial, and taking short notice. Q. How bankruptcy is to be pleaded *puis darrein continuance*. *Lindo v. Simpson*, T. 45 Geo. III.

659

42. *Semble*. A defendant is not entitled to a rule to shew cause why the plaintiff should not give security for costs, until he has applied to the plaintiff's attorney, and he has refused; or at least, he is not entitled to make it absolute, if the plaintiff's attorney having offered to give such security as the master should require, and to enter into a bond for that purpose, the defendant refuses to accept of this accommodation, in order merely to gain time, or defeat the purposes of justice. *Cheap v. Popham, Bart.* T. 45 Geo. III.

661

43. A bond for payment of money by instalments yearly, with a separate agreement, that the forfeiture of the condition is not to extend to accelerate the payment is within the statute 8 & 9 W. III. c. 11, s. 8, and the plaintiff having obtained judgment thereon, cannot sue out execution for

a subsequent instalment without suing out a *scire facias*. *Willoughby v. Swinton*, T. 45 Geo. III. 663

PRISONER.

See PRACTICE, No. 36, and *Anonymous*, T. 648

PRISONER'S SIXPENCES.

See LORD'S ACT, No. 3, and also *Buckley v. Tweedie*, H. 394

PRIOR ACT OF BANKRUPTCY.

See BANKRUPT, No. 3, and *Kennet v. Duff*, H. 448

PROMISSORY NOTE.

See POOR, No. 1, and BILL OF EXCHANGE.

PROVISO.

See EJECTMENT, No. 2.

PUBLIC FUNDS.

See POOR-RATE, No. 2.

PUIS DARREIN CONTINUANCE.

1. See PLEADING, No. 10, and *Willoughby v. Wilkins*, H. 396
2. *Lindo v. Simpson*, T. 659

PURCHASER OF ESTATE.

See PLEADING, No. 18.

QUO WARRANTO.

See ELECTION, No. 2.

REGISTRY OF A SHIP.

Held, that an indorsement of a bill of sale of a ship on the transfer of property therein, is not valid within the registry acts, if made on a register which is cancelled and void; even though it was so cancelled, in consequence of obtaining a former register *de novo*, which was invalid.

Semble, the indorsement should be made at the time of making

the bill of sale, or in a reasonable time after, and should state the true date of the bill of sale, and will not be good where the indorsement is dated on one day and the bill of sale subsequently. *Moss and Others v. Mills and Another*, H. 45 Geo. III. 227

REGULA GENERALIS.

Regula Generalis, Hilary Term, 45 Geo. III. Day Rules. *Ex parte Coppinger*, H. 45 Geo. III. 339

REMAINDER, TENANT IN.

See EJECTMENT, No. 3, and COPYHOLD, No. 2; *Doe dem. Whitbread v. Jenney*, M. 116

RENT.

1. See PLEADING, No. 3; and *Gregory v. Badcock*, M. 18
2. See EJECTMENT, No. 5.

RENT CHARGE.

See APPOINTMENT, No. 1.

REPLEVIN.

1. Held, that the stat. 24 Geo. II. c. 44. § 6, does not extend to actions of replevin; they being proceedings in rem. to which the provisions of that statute are inapplicable, as they would go wholly to defeat the object of the suit to recover the goods. *Fletcher v. Wilkins and Another*, H. 45 Geo. III. 365
2. See PLEADING, No. 19, and *Forty v. Imber*, E. 548

RESIDUARY ESTATE.

See DEVISE, No. 1.

REVERSION.

See DEVISE, No. 5; and *Goodtitle ex dem. Daniel v. Miles*, E. 468

RULES.

See DAY-RULES, and PRACTICE, No. 1.

RUNAWAY PAUPER.

See POOR-RATE, No. 3.

SALE OF DEBTS.

See BANKRUPT, No. 2; and *Anstey v. Marden*, E. 426

SALE NOTE.

A sale note or memorandum on the sale of goods, is not required to be signed by both parties, but only by the parties to be charged therewith, under the 39 Car. II. c. 3. s. 17; *aliter* of a promise to pay the debt of another, which comes under the 4th section of that statute. *Egerton v. Matthews and Another*, H. 45 Geo. III. 389

SALE OF STANDING CROP.

See TRESPASS, No. 5; and *Crosby v. Wadsworth*, T. 559

SCIRE FACIAS.

1. Whether the suit against the principal be by bill or original, the venue in a *sci. fa.* may be in *Middlesex*; for a *sci. fa.* being a local action founded upon a record, the proper venue is, where the record (i. e. the recognizance of bail) is, and that recognizance in the *K. B.* is a record in *Middlesex*. *Coxeter and Another v. Burke*, M. 14
2. See ANNUITY, No. 2; and *Howell and Another v. Stratton and Another*, M. 66
3. See PRACTICE, No. 4; and *Willoughby v. Swinton*, T. 663

SEPARATION.

See BARON AND FEME, No. 2.

SEAL-OFFICE.

No holiday at the Seal-office on the first day of *Easter Term*, and no extra fee can be demanded. The remedy of the party is by motion. *Seal Office. Holidays*, E. 45 Geo. III. 403

SEAMEN.

See Stat. 31 Geo. II. c. 10, s. 30; and *Walsh v. Toulmin and Another*, T. 657

STATUTES.

SETT-OFF.

See PRACTICE, No. 2; and *Green v. Law*, T. 668

SETTLEMENT.

B. a pauper and his family, comes into a parish under a certificate, and has a son *W.* born there, who quits his father's family, marries, and has children, and after the death of *B.* the son of *W.* is bound apprentice to, and serves with him. Held, he gains a settlement; for *W.* was removable, and not protected by the certificate. *The King v. the Inhabitants of Mortlake*, E. 45 Geo. III.

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SHIPS REGISTER.

See REGISTRY, No. 1.

SHERIFF.

See PRACTICE, No. 17.

SPECIAL CAPIAS.

See PRACTICE, No. 23.

SPECIAL PROPERTY.

See TROVER, No. 2; and *Hopkinson v. Gibson*, M. 202

STAMP.

Where an attorney had wholly prepared and signed a bond to pay money to his client, upon a wrong stamp, he was compelled, upon motion, to put a proper stamp upon it; but, though the only subscribing witness was his own servant, at the time of the execution, the court refused to admit the execution of the bond; he swearing that he did not then know where such witness resided. *Guilliam v. Barnett*, M. 45 Geo. III.

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STATUTES.

1. 24 Geo. III. c. 44, see **CONSTABLE** and **NOTICE**.

2. 44 Geo. III. c. 108. See **INSOLVENT ACT**; and *Ex parte M. Wilkins*, M. 62

STATUTES.

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3. 44 Geo. III. c. 108. See **INSOLVENT**; and *Ex parte Abraham Ergas*, and *Ex parte J. Evans and Others*.

4. 44 Geo. III. c. 95. See **INFANT**, No. 1.

5. 43 Geo. III. c. 55, s. 10. On an inquisition to assess damages to the proprietors for the possession of lands, &c. taken for the use of government, under the stat. 43 Geo. III. c. 55, s. 10, called the general defence act, a compensation in a gross sum cannot be awarded, but it must be by an annual compensation in the way of rent to be paid to the persons entitled to the land; and the inquisition will be bad, if all the parties interested are not summoned and properly compensated. *Bingham v. Serle*, M. 45 Geo. III. 129

6. 37 Geo. III. c. 31. See **ATTORNEY**, *Ex parte W. Saunders*, M. 154

7. Of Limitations. See **EJECTMENT**, No. 1; and *Doe dem. George and Wife v. Jesson*.

8. 42 Geo. III. c. 90, s. 41; and 43 Geo. III. c. 82, s. 44. See **MASTER and SERVANT**, No. 1; M. 238

9. 29 Geo. III. c. 33, s. 7. 241
10. 6 Geo. III. c. 31, s. 1. See **POOR**. 246

11. 43 Eliz. c. 2; and 10 Anne, c. 6. See **POOR-RATE**, No. 2.

12. 5 Geo. I. c. 8, s. 1. See **POOR-RATE**, No. 3.

13. 18 Eliz. c. 5, s. 3. See **INFORMATION**, No. 1.

14. 9 Geo. III. c. 5, s. 5. See **IMPRESS**, No. 2.

15. 24 Geo. III. c. 44, s. 6. (Notice to Justices.) See **REPLEVIN**, No. 1; and *Fletcher v. Wilkins and Another*, H. 365

16. 17 Car. II. c. 8. See **PRACTICE**, No. 28.

17. 39 & 40 Geo. III. c. 106. See **CONVICTION**, No. 3.

18. 44 Geo. III. c. 10, s. 2. See **CORN BOUNTY**, No. 1; and *Sorsbie and Others v. Munro and Others*, T. 568

19. By the 31 Geo. II. c. 10, s.

SURRENDER.

36, no person receiving wages, &c. for the service of any officer, seaman, or other person, in the royal navy, shall take or retain more than 6d. in the pound, &c. under a penalty of 50l. This applies to a lieutenant; and whereas, by subsequent acts, he is empowered to draw for his pay every three months, the agent who makes up his accounts is entitled to receive 6d. in the pound only upon the balance actually received and paid by him, the agent; and if, through mistake of the law, he deducts in such case upon the whole sum paid by government, he is liable to the penalty. *Walsh v. Toulmin and Another*, T. 45 Geo. III. 607
 20. 8 & 9 W. III. c. 11, s. 8. See PRACTICE, No. 4. T. 663
 21. 8 & 9 W. III. c. 11, s. 8. See PRACTICE, No. 1; and *Welsh v. Ireland*, T. 666
 22. 43 Geo. III. c. 46. s. 3. See PRACTICE, No. 3.
 23. 42 Geo. III. c. 38, s. 30. See APPEAL, and *The King v. Shone*, T. 643

STATUTE OF FRAUDS.

1. See SALE NOTE, No. 1; and *Egerton v. Matthew and Another*, H. 389
2. See TRESPASS, No. 5.

STEWARD.

See COPYHOLD, No. 5.

STOCK.

See POOR-RATE, No. 2; and *The King v. St. John's, Maddermar-ket*, H. 270

STOPPAGE IN TRANSIT.

See TROVER.

SURRENDER.

See DEVISE, No. 3.

TAKING MONEY OUT OF COURT.

See PRACTICE, No. 8; and *Ward v. Lowring*, H. 49

TRESPASS.**TITLE, GOOD.**

See PLEADING, No. 18.

TOBACCO.

See TROVER, No. 4.

TOLL.

See ACTION ON THE CASE, No. 5; and *the Bailiff, &c. of Tewksbury v. Diston*, E. 508

TRESPASS.

1. See NOTICE, and Stat. 24 Geo. II. c. 44; and *Jones v. Vaughan*, M. 6
2. See NUISANCE; and *Raikes v. Townsend*, M. 9
4. See COSTS, No. 3; and *Ward v. Mallender*, M. 63
4. *Semble*, an extra exciseman is entitled to notice under the excise laws, on actions brought against him for any thing done in pursuance of any of the excise laws; or at least, he is entitled to it, as a person acting under an excise officer, if he is sent to make a search in a boat coming on shore, though no excise officer appointed by warrant from the board be present. *Clements and Wife v. Keen*, H. 45 Geo. III. 220
5. *A.* by parol, agrees to sell *B.* a standing crop of grass for 20 guineas, *B.* is to mow it and to make it into hay, but no time is fixed for the mowing, or for the payment of the money, nor is possession of the close given. *A.* afterwards gives *B.* notice that he shall not have the grass, and sells it to *C.*—*B.* enters privily, and cuts part of the grass: *A.* then gives notice to him not to mow; and *C.* under the direction of *A.* mows and carries off the same. Held, that *B.* cannot have trespass *quare clausum fregit*, nor *de bonis asportatis*, for it is a contract for an interest in or concerning lands under the 4th section of the statute of frauds, 29 Car. II. c. 3. and not being in writing, and being executory. *A.* might well

Discharge it. *Crosby v. Wadsworth*,
T. 45 Geo. III. 559

TRESPASS DE BONIS AS- PORTATIS.

One who has built a bridge for public use on the soil of, and under a grant of liberty for that purpose from another, may maintain trespass *de bonis asportatis*, against a wrong doer who pulls down part of it, and takes away the materials of which it was built. For when severed from the bridge, the property in the materials reverts to the original owner. *Harrison v. Parker and Another*, H. 45 Geo. III. 262

TROVER.

1. See COMMON CARRIER, No. 1.

2. Where a colonel had purchased horses for government, and they being approved of by the proper inspecting officer, were sent under the care of a serjeant to the receiving depôt for his majesty's use, held, that the colonel had not such a special property as to maintain trover for one of them which was taken out of the possession of the serjeant as a distress for a turnpike toll. *Hopkinson v. Gibson*, H. 45 Geo. III. 102

3. See BANKRUPT, No. 3.

4. Where A. a broker, purchased tobacco for B. and placed it in the king's warehouse in his own name, and then transferred it into the name of C. as a pledge, held that B. after demanding the tobacco of C. and his refusal to deliver it up, might well maintain trover; for the taking the transfer of the tobacco is a conversion, although the same remained in the king's warehouses, the duties not being paid thereon. *McCambie v. Davies*, T. 45 Geo. III. 557

5. Where goods from abroad are consigned to a factor to sell under a bill of lading, though he

may indorse the bill of lading to a vendee, yet he cannot assign it merely as a pledge. The merchant who takes the indorsement of a bill of lading should require to see the letter in which it was sent, and look to the title which the indorser has, whether as factor or vendee. *Newson v. Thornton*, H. 45 Geo. III. 207

6. A. sells all his starch to B., at so much per cwt. by bill at two months, allowing fourteen days for the delivery, and orders his warehouse-keeper to weigh and deliver all his starch to B. who in consequence thereof, obtains the delivery of a part, and before the whole is weighed and delivered, becomes bankrupt; held, that A. may refuse to deliver the residue which is unweighed, the delivery of part not being a constructive delivery of the whole, where any thing remains to be done, as weighing, to ascertain the price. *Hanson and Another v. Meyer*, T. 45 Geo. III. 670

VENUE.

1. See SCI. FA. No. 1, and PLEADING, No. 1.

2. See PRACTICE, No. 14; and *Preston and Others v. Stratton and Others*, M. 157

3. See PRACTICE, No. 32; and *Price and Others v. Woodburn*, H. 447

VERDICT.

1. Where a verdict is taken for a fixed sum, subject to an arbitration, and the arbitrator, through mistake of his power, awards a larger sum to the plaintiff, the court will permit the plaintiff, upon motion, to enter the judgment for the sum in the verdict, the arbitrator stating in an affidavit, that he considered only the subject matter of the cause referred. *Bonner v. Charlton*, M. 45 Geo. III. 8

2. See COSTS, No. 3; and *Ward v. Mallender*, M. 63

714 WATER, RIGHT TO.

VERDICT FOR PLAINTIFF, WITH COSTS TO THE DE- FENDANT.

See COSTS, No. 6; and *Anony-
mous, H.* 261

USE AND OCCUPATION.

See PLEADING, No. 16; and the
King v. Frazer, E. 462

WAIVER.

See PRACTICE, No. 22; and
Gaire v. Goodman, H. 391

WARRANT.

See MASTER AND SERVANT,
No. 1.

WARRANTY.

1. See INSURANCE OF LIFE,
No. 1.

2. See ASSUMPSIT, No. 5; and
Morris v. Lithgoe, E. 395

3. See INSURANCE, No. 3; and
Le Mesurier v. Vaughan, E. 492

WATER, RIGHT TO.

See ACTION ON THE CASE,
No. 3; and *Bealey v. Shaw, H.* 321

WRIT OF ERROR.

WILL.

1. See DEVISE generally.

2. See DEVISE, No. 1; and
*Doe dem. of T. Stopford v. R. Stop-
ford and Another, M.* 91

3. See DEVISE, No. 2; and
Pierson v. Vickers and Others, M. 163

WITNESS.

Where an attorney had wholly
prepared and signed a bond to pay
money to his client, upon a wrong
stamp he was compelled upon
motion to put a proper stamp
upon it; but, though the only
subscribing witness was his own
servant, at the time of the exe-
cution, the court refused to com-
pel him to admit the execution
of the bond, he swearing, that
he did not then know where such
witness resided. *Guilliam v. Ber-
net, M.* 45 Geo. III. 155

WRIT OF ERROR.

1. See PRACTICE, No. 9.

2. See PRACTICE, No. 18; and
Barnard q. t. v. Gay, H. 259

END OF VOL. II.

ERRATA.

Page 410, 412, 414, 416, first line, for *Hilary Term*, read *Easter Term*.
Page 593, for the *King v. Marsac*, read the *King v. Brisac*.

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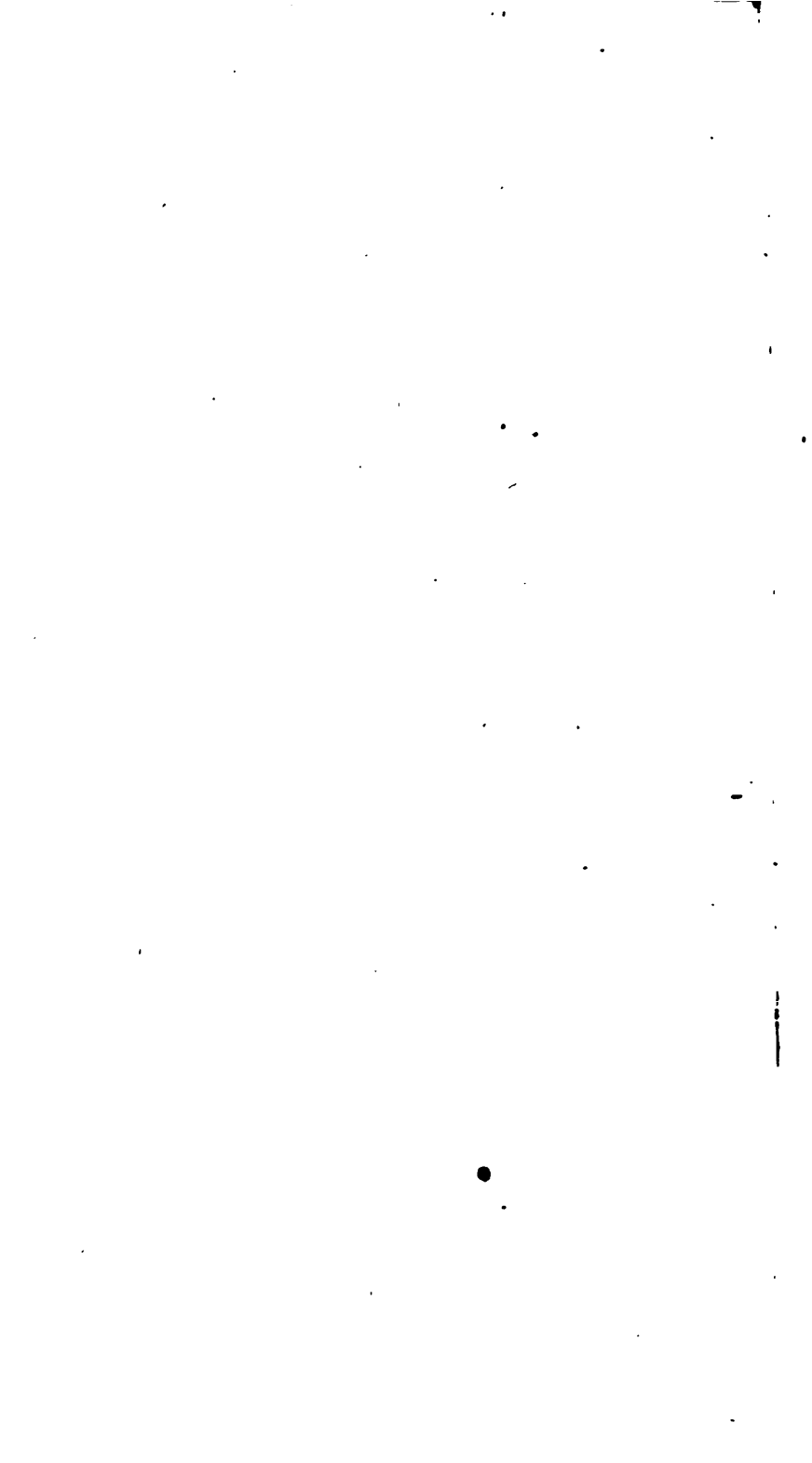


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